

THE  
INTERNATIONAL LAW OF TERRITORIAL WATERS  
WITH SPECIAL REFERENCE TO THE  
COASTS OF SCOTLAND.

by

William Michie Newlands, M.A., LL.B., Ph.D.

---

Thesis presented for the degree of D. Litt.

University of Edinburgh.

1939.

---



PREFATORY NOTE.

-----

In this exercise an attempt has been made to examine the international law relating to territorial waters as it affects Scotland. The restriction of the subject to its application to a relatively small portion of the waters claimed as territorial precludes mention of much which would require notice in a more comprehensive study of territorial waters generally. Reference has necessarily been made to the practice of States in other parts of the globe with the twofold object of ascertaining where possible the law applicable to Scottish territorial waters and of obtaining a proper perspective of that law.

The work is divided into two parts. part I is treated historically to illustrate, from the Scottish standpoint, the development of a situation which brought about the freedom of the seas and the restriction of territorial waters. part II deals with the modern International law as the essayist conceives it to be.

The essayist gladly takes this opportunity to acknowledge that this study was inspired by Professor W. Wilson, who first interested him in Law and has ever since encouraged him to further study, and that the inclusion of the historical part is largely due to an interest in historical research aroused by Mr D. P. Heatley/<sup>formerly</sup> of Edinburgh University



University. His thanks are also due to the staffs of the various libraries and government departments for their patience and assistance and to the University of Copenhagen for references to translations of the ancient Norse laws.

W.M.N.

Edinburgh. 1939.

THE INTERNATIONAL LAW OF TERRITORIAL WATERS  
with special reference to the  
COASTS OF SCOTLAND.

-----  
P A R T I.

Historical Introduction.  
-----

|   | Page |
|---|------|
| (1) Synopsis.....                                     | iv - |
| (2) Chapter I.  |      |
| Introduction.....                                     | 1.   |
| The Mediterranean claims to territorial waters.....   | 4.   |
| The Scandinavian claims to territorial waters .....   | 12   |
| Deducations from these early claims.....              | 17   |
| (3) Chapter II.                                       |      |
| The early Scottish claims to territorial waters.....  | 20   |
| (4) Chapter III.                                      |      |
| The Scottish claims to "Reserved waters".....         | 34   |
| (5) Chapter IV.                                       |      |
| The early English claims to territorial waters.....   | 54   |
| (6) Chapter V.  |      |
| From <u>Mare Liberum</u> to <u>Mare Clausum</u> ..... | 71.  |
| (7) Chapter V.  |      |
| The juridical controversy and Welwod.....             | 72   |

## P A R T                      II.

Page

|  |     |
|--|-----|
| (1) Chapter I  |     |
| The general historical background to the develop-<br>ment of the present international law of terri-<br>torial waters..... | 102 |
| (2) Chapter II   |     |
| The sources and evidence of the modern internat-<br>ional law of territorial waters.....                                   | 120 |
| (3) Chapter III.   |     |
| The juridical status of territorial waters.....  | 134 |
| (4) Chapter IV.  |     |
| The extent of territorial waters .....   | 180 |
| Section A. - The marginal sea.....   | 180 |
| Section B. - The Scottish Firths.....  | 209 |
| (5) Chapter V.   |     |
| State jurisdiction in territorial waters in time<br>of Peace .....   | 228 |
| (6) Chapter VI.  |     |
| State jurisdiction in territorial waters in time<br>of War.....  | 257 |

## A P P E N D I C E S.

|   |      |
|---|------|
| 1. Letter dated 22nd October, 1562, of Eric XIV of<br>Sweden to Mary, Queen of Scots.....                               | 287  |
| 3. Extract from a contract between Patrick, Earl of<br>Orkney and the Fife Burghs.....                                  | 290  |
| 2. Extract from Charter dated 29th July, 1587 confirming<br>Earl of Bothwell as Admiral of Scotland.....                | 289  |
| 4. Extract from the Treaties of 1541 and 1550.....  | 291. |
| 5. Extract from Act of 1593 of the Scottish Estates<br>for the annexation of the assise of herring to<br>the Crown..... | 292. |

- (6) Act dated 1573 of the Scottish Estates requiring herring and white fish to be landed only at free ports.....292
- (7) Extract from Warrender Papers - Draft instructions to the Scottish ambassador to the Low Countries (1594) 293
- (8) Extract from Bruce's report on the union.....294
- (9) Claim dated 1629 of the Scottish Burghs to the fishing at the Island of Lewis.....295
- (10) Extract from Collection of Admiralty Court Decisions.....297
- (11)
- (1) Commission of the Judge of the Admiralty Court of Scotland in favour of John Adair.297
- (2) Copy of letter from Adair dated 2nd June, 1712..... 298
- (12) Extract from Treaty between the United Kingdom and Sweden. 1654.....299
- (13) Extract from Treaty between the United Kingdom and Denmark 1660-1.....300
- (14) do. do. 1670.....301
- (15) Extract from the Treaty between the United Kingdom and Sweden 1656.....302
- (16) Note from the Danish Minister for Foreign Affairs to Earl Granville. 1926.....302.
- (17) Extract from the Treaty between the United Kingdom and the United States, 1815..... 303
- (18) Extract from the Treaty between the United Kingdom and the United States, 1818.....303
- (19) Extract from the Treaty between the United Kingdom and the United States, 1871. ....304
- (20) Extract from the Treaty relating to the status of Spitzbergen, 1920..... 305
- (21) Extract from the Temporary Commercial Agreement between the United Kingdom and the Union of Soviet Socialist Republics, 1930..306
- (22)/



|          |   |     |
|----------|---|-----|
| (22)     | Extract from the Convention between Great Britain and Finland, 1933.....  | 306 |
| (23)     | Treaty between Canada and the United States 1925.....   |     |
| (24)     | Letter from Foreign Office as to the negotiations respecting Norwegian claims to territorial waters.....                  | 307 |
|          | Annex (a) Norwegian Royal Decree dated 12th July, 1935.....   | 308 |
|          | Annex (b) Report of Norwegian Committee on Foreign Affairs.....   | 310 |
|          | Annex (c) Speech of the Norwegian Minister for Foreign Affairs to the Storting on June, 24th, 1935.....                   | 316 |
| (25) (1) | Map showing areas closed to trawling on the coasts of Scotland..... to face   |     |
|          | Map of the Moray Firth showing area closed to trawling and the limits of exclusive fishing..... to face                   |     |
| (26)     | Convention between the United Kingdom and the United States respecting the Liquor Traffic, 1924.....                      |     |
| (27)     | Temporary Fisheries Agreement between the Governments of the United Kingdom and the Union of Soviet Socialist Republics.. |     |
| (28)     | Extracts from the statutes affecting fishing in the territorial waters of Scotland.                                       | 321 |
| (29)     | Extracts from the Treaty of 1908 as to the maintenance of the <u>Status Quo</u> in the North Sea.....                     | 325 |
| (30)     | Note of Miscellaneous British treaties relating to the reservation of fishing in territorial waters for nationals.....    | 325 |

-----



|   |     |
|---|-----|
| Bibliography and note of abbreviations used in<br>the footnotes ..... | 326 |
|---|-----|

Unedited MSS and Records:

|   |     |
|---|-----|
| A. In H.M. Register House, Edinburgh..... | 326 |
| B. In Edinburgh University Library,.....  | 326 |
| C. In National Library, Edinburgh.....    | 326 |

Edited Primary Sources:

|  |     |
|--|-----|
| D. Scottish.....   | 327 |
| English.....   | 327 |
| British .....  | 328 |
| United States of America .....   | 328 |
| League of nations....  | 328 |
| E. Miscellaneous and secondary sources includ-<br>ing records printed other than by the<br>Crown or other official authority.. | 329 |

## SYNOPSIS.

## PART I.

## Chapter I.

## Section I.

Page

- I. The general distinction between territorial waters and the high seas..... 1.
- II. This distinction was the outcome of the controversy as to the appropriation of the oceans, and..... 2.
- III. Suggests a natural division to be adopted for this essay..... 3.

## Section II.

The early Mediterranean claims to maritime dominion.

- I. The conception of maritime dominion was impossible to the Greeks, and..... 4
- II. The Grecian ear affords no example of maritime dominion..... 5
- III. The Roman Empire likewise affords no example of maritime dominion ..... 6
- IV. Circumstances, however, after the fall of the Roman Empire were favourable to the formulation of claims to maritime dominion..... 7
- V. The outstanding example of these claims was that of Venice to the Adriatic..... 9
- VI. The development of the Venetian claims outlined.... 9
- VII. The Venetian precedent was of limited application and afforded no guide to the appropriation of the high seas..... 11

Section /

## Section III.

|  | Page |
|--|------|
| The early Scandinavian claims to maritime dominion.  |      |
| I. The Scandinavian influence in Scotland.....   | 12   |
| II. The Scandinavian claims illustrate the economic and political factors which were favourable to the assertion of maritime dominion..... | 12   |
| III. Resume of the development of the claims.....  | 14   |
| IV. A letter from the King of Norway to Mary Queen of Scots illustrates the maturity and the content of the claims.....                    | 16   |
| V. Resume of the historical importance of the Scandinavian claims.....   | 16   |

## Section IV.

The deductions from the Mediterranean and the Scandinavian claims.

|   |    |
|---|----|
| I. The elements common to the Mediterranean and the Baltic regions indicate the essential conditions for the origin and the assertion of claims to maritime dominion..... | 17 |
| II. The transition to maritime sovereignty.....   | 18 |
| III. Application of the above to Scotland.....  | 19 |

## Chapter II.

The early Scottish claims.

|   |    |
|---|----|
| I. The direct evidence touching possible Scottish claims is scanty and reliance must be placed upon local factors and continental influences....        | 20 |
| II. Although characteristically Scottish, the burghs borrowed ideas from their continental counterparts   | 21 |
| III. Generally, European practices and law, observed as common to most maritime states, was adopted for national purposes subject to modifications..... | 22 |
| IV./  |    |

- IV. The relative unimportance of foreign trade hindered the adoption of foreign practices but, later, famine gave an impetus and importance to the fishing industry and weight to the burgh claims to the reservation of the fisheries.....23
- V. The Scots were not a leading maritime nation.....24
- VI. And the burghs were conservative and unprogressive. They were the party most interested in the rights in the territorial waters.....25
- VII. With only occasional turns of fortune the sea power of Scotland was weak.....25
- VIII. Even after the Union of the Crowns the burghs relied upon the support of others.....27
- IX. The absence of a naval force for police purposes and other circumstances favoured piracy .....27
- X. The function of suppressing piracy was undertaken by the burghs and the Sovereign.....28
- XI. The operations of the burghs was of the nature of self help.....29
- XII. While the efforts of the Sovereign were restricted as to locus and thus raised the question as to whether a special jurisdiction was claimed in the coastal waters.....29
- XIII. Generally the firths and sea lochs were certainly admitted as within the King's franchise but there is no indication as to the size of the lochs which might be appropriated.....30
- XIV. The northern islands were in a special position due to Scandinavian influence and tradition.....32
- XV. The intention of the Crown was to claim a maritime jurisdiction modelled on that of the continental powers but was opposed by the burghs.....32
- XVI. The conclusion reached on the evidence is that the clearly defined bays were certainly territorial waters but the jurisdiction over other coastal waters was unsettled at the close of the 15th century.....33



## Chapter III.

The Scottish claims to Reserved Waters until 1603.

Page

- I. "Reservation of waters" was the theme of the Scottish claim.....34
- II. The claim was fostered, yet hindered, by local circumstances. A change was brought about in its fortune after the union of the Crowns and it then attained...35 international importance.
- III. The origin of the exclusive rights of fishing in Teutonic States.....36
- IV. The Scandinavian influence is evident in the Orkney and Shetland Isles.....36
- V. Early Scottish grants elsewhere are cited in support of the reservation but are of doubtful validity.....37
- VI. The evidence as to the Orkney and Shetland reservations is clear but.....39
- VII. Cannot substantiate the wider claims of the burghs as applicable to the whole of the sea coasts.....40
- VIII. The 15th century was a period of aggression against the foreigner. The Sovereign was interested for fiscal reasons.....40
- IX. The subject of the herring fishing was mooted with the Dutch.....42
- X. But was left unsettled in the treaties.....43
- XI. There was a wide economic change and redistribution of wealth.....44
- XII. The chief factors affecting the Scottish fisheries and revenue therefrom are noticed.....46
- XIII. The legislative and other expedients feverishly adopted for the protection of the fisc and the increase of the fish were scarcely effective.....46
- XIV. In furtherance of the same objects the burghs aimed at the conservation of their privileges.....49
- XV. The claim of the burghs to reserved fishing was not yet countenanced by the municipal law.....50.



- XVI. The Scots were, also conscious of a duty with reference to the suppression of piracy in the coastal waters. Two contemporary illustrations are given..... 50
- XVII The conclusion reached is that the Scottish claims to territorial jurisdiction in the marginal seas was essentially burghal on a lower plane than the continental but after the union of the Crowns influenced the policy of England.... 52

#### Chapter IV.

##### The early history of the English claims.

- I. The similarity between the Scottish and English claims is noted and also the tendency to differ towards the close of the Tudor period.....54
- II. The English claims centre round the keeping of the seas, in essence, sea power. The prevalence of piracy necessitated a protective force, but, though not impossible, there is no claim to maritime dominion.....55
- III. The King in 1420 declined to levy dues on shipping in the Narrow Seas in virtue of potential sovereignty.....57
- IV. The English jurisdiction proper was confined to a relatively narrow coastal belt similar to the Scottish and other jurisdictions.....58
- V. Documentary evidence of 1303 and 1521 points to the acceptance of the restricted jurisdiction.....58
- VI. The jurisdiction and the office of admiral of England was very similar to the jurisdictions of the French and the Scottish admirals whose jurisdiction were not exclusive upon the high seas.....59
- VII. The instructions and the duties of the admiral in the Narrow Seas are indicated in the Privy Council records of the closing years of Queen Mary.....60
- VIII. The time at which the sovereign maritime jurisdiction of the king of England came to be restricted to the narrow coastal belt is unknown but the declinature of Henry V in 1420 rendered a broadening of the jurisdiction almost impossible.....61

|  |    |
|--|----|
| IX. By 1562, the English attitude was that the harbours and their precincts were within the territory of the sovereign and Elizabeth's reply to the Spaniards showed that she favoured the complete freedom of the seas.....               | 61 |
| X. But Elizabeth's theory was not consistent with the practice elsewhere.....  | 63 |
| XI. In effect English policy was that of the North Sea states, Denmark excluded.....   | 65 |
| XII. The policy of allowing the alien absolute freedom had some effect in regard to the decay of the fishing ports.....  | 65 |
| XIII. While the foreigner was protected from molestation on the fishing grounds where he had complete freedom.....   | 66 |
| XIV. The remedy proposed for the impoverished condition of the navy and the decay of the fishing ports was to bring about an increased consumption of fish and the prevention of competition by the foreigner in the home market only..... | 67 |
| XV. The conclusion is that until the Stuart period there was no English claim to an extensive maritime domination.....   | 69 |

## Chapter V.

### From Mare Liberum to Mare Clausum.

|   |    |
|---|----|
| I. James I of England was familiar with the Scottish claim to the reservation of the fisheries in the coastal waters. The circumstances were otherwise favourable for an attack upon the Dutch through their fishing..... | 71 |
| II. Schemes to this end were promoted and James, by proclamation, required fishermen to obtain licences. The Dutch successfully countered the proposal by diplomacy.....  | 72 |
| III. James also received a rebuff at the hands of the Scottish burghs in the matter of the building of busses.....  | 75 |
| IV. An attempt to levy the herring assise from the native fishermen at the northern isles proved unsuccessful/  |    |

|  |    |
|--|----|
| unsuccessful.....  | 75 |
| V. But the tax was paid in error by some Dutch later..   | 76 |
| VI. The Scots were forbidden to fish within the territorial waters of the King of Denmark and the Scots unsuccessfully requested that their waters be likewise recognised.....   | 76 |
| VII. The Privy Council attempted to induce the King to act.....  | 77 |
| VIII. But his action was futile .....  | 78 |
| IX. Added to this there was trouble with the Dutch at the Spitzbergen whale fishing. King James used forceful language to the Dutch envoys but to no end.....                    | 78 |
| X. The controversy as to the <del>the</del> exclusion of the Dutch from the fishing was dormant during the rest of the reign.....  | 79 |
| XI. The period, however, saw the rights and duties placed upon a definite footing.....   | 80 |
| XII. There was the delimitation of the King's Chambers, and the extent of the territorial waters for the purposes of prize law.....  | 81 |
| XIII. The unreasonable pretensions of Charles I and his successors were facilitated by the animosity towards the Dutch. A pin pricking offensive was commenced against them..... | 81 |
| XIV. The chief point was the requirement of the vail or naval salute, a ceremony which the English claimed was an acknowledgment of their sovereignty of the seas.....           | 83 |
| XV. The requiring of the vail was but a pretext. The struggle was to decide which State should attain the leading place.....   | 85 |
| XVI. The attempt of Charles to found a fishing company but the Scottish interests had to be brought over to consent.....   | 86 |
| XVII. The burghs definitely claimed the "reserved waters".....   | 86 |
| XVIII. On the King protesting, the burghs and the<br>Scottish/   |    |

|   |     |
|---|-----|
| Scottish Estates claimed the North Sea to the mid-line as the Scottish territorial waters and detailed, for the first time, the waters reserved for fishing ..... | 86  |
| XIX. The King by threats obtained the revision of the scheme of reserved waters and admitted it partially.....  | 90  |
| XX. The Fishing Company failed and the claim to the "reserved waters" in its old form became dormant  | 91. |

## Chapter VI.

### The juridical controversy and Welwod.

|   |     |
|---|-----|
| I. Grotius - an appreciation.....   | 92  |
| II. The controversialists ranged themselves under their national banners.....                                     | 93  |
| III. Selden, Grotius and Bynkershoek practically exhausted the subject.....                                       | 94  |
| IV. But Welwod brought some distinction to Scotland. His Sea Lawe of Scotland.....                                | 95  |
| V. Welwod's Abridgement of all Sea laws.....  | 96  |
| VI. Welwod's view as to the extent of the King's jurisdiction for purposes of neutrality.....                     | 97  |
| VII. His reply to Grotius and their agreement as to the freedom of the high seas.....                             | 97  |
| VIII. Craig's view as to the appropriation of the seas and the reservation of the fisheries along the coasts..... | 98  |
| IX. Welwod's De Dominio Maris.....  | 99  |
| X. An appreciation of Welwod's part in the controversy.   | 100 |



## P A R T      II.

-----  
C H A P T E R   I.

The general historical background of the development of the modern international law of territorial waters.

|   | Page |
|---|------|
| I. During the period under review the former claims to wide maritime dominion were superseded by claims to narrow belts of coastal waters.....  | 102  |
| II. There has been no distinctive Scottish contribution to the development of the modern international law of territorial waters but while the Scottish Admiralty Court retained a jurisdiction it made a real attempt to take a proper view of international legal obligation.....   | 104  |
| III. The first stages in the disintegration of the Spanish and Portuguese claims to dominion upon oceans were due to the trading and colonising enterprises of the Dutch and the English.....   | 107  |
| IV. The principal impetus to the development of the present international law of territorial waters was given by the naval wars of the eighteenth and nineteenth centuries. The international law so evolved was related to the exigencies of naval warfare and now requires to be adapted to the requirements of peace, the normal relation of States..... | 108  |
| V. A factor which conditioned the substance of international law was the recognition of the rights and duties of neutrals in the shaping of which the United States of America exercised considerable influence.....  | 109  |
| VI. In Britain there was also a change in political and economic thought which reconciled English opinion to the abandonment of the former claims. There is no evidence of any serious attempt to resuscitate the Scottish claim to reserved fisheries, the law regarding which was obscure.....  | 111  |



|       |  |     |
|-------|--|-----|
| VII.  | The restriction of territorial waters to a narrow belt <u>ex adverso</u> of the territory of the State was largely due to the exigencies of the British navy and the fishery disputes with the United States of America..... | 115 |
| VIII. | The restriction appears to be permanent.....   | 116 |
| IX.   | The shackles of the past, however, have not been easily shaken off.....  | 118 |
| X.    | Hall's general resumé of the progress of international law during the period under review. Concentration is now upon the fundamental principles..  | 118 |

## Chapter II.

### The Sources and Evidence of the Modern International Law of Territorial Waters.

|       |  |     |
|-------|--|-----|
| I.    | The modern international law of territorial waters may be dated from the French Revolutionary Wars, ..   | 120 |
| II.   | Since some of the issues as to territorial waters are the subject of controversy the sources and evidence of the law require to be considered....  | 120 |
| III.  | Custom, as a source of law, must be distinguished from mere usage.....   | 121 |
| IV.   | When has usage matured into binding custom?.....   | 122 |
| V.    | The rules for the Permanent Court of International Justice afford an authoritative guide for the evaluation of the evidence of the law.....  | 123 |
| VI.   | The first rule, express contractual obligation, presents no difficulty.....  | 124 |
| VII.  | But the second and third rules are too general in their terms to afford a definite guide and they bristle with difficulty. Secondary sources and evidences must therefore be considered..... | 125 |
| VIII. | The issue is immediately raised as to the weight and sufficiency of evidence. Criteria are suggested.....  | 125 |
| IX./  |  |     |

|       |  |     |
|-------|--|-----|
| IX.   | Prize Courts, while purporting to administer international law, are nevertheless bound by municipal law.....   | 127 |
| X.    | The restrictions imposed by municipal law upon Prize Courts are, however, slight.....  | 128 |
| XI.   | Prize Courts may, therefore, under favourable conditions be accepted as stating the law with some authority and the respect shown to the judgments of Lord Stowell in the English Prize Court may be cited as an example ..... | 129 |
| XII.  | The Scottish Admiralty Court, while free to administer international law, exercised no influence on the development of the law.....  | 130 |
| XIII. | Finally, as evidence of the law, the consensus of opinion of publicists is accepted in all countries even in Britain and America where there is a strong inclination to follow precedent.....                                  | 131 |
| XIV.  | General summary.....   | 132 |
| XV.   | The application of the conclusions to the law relating to the Scottish coasts.....   | 133 |

### Chapter III.

#### The Juridical Status of Territorial Waters.

|      |   |     |
|------|---|-----|
| I.   | Terminology - "Territorial Waters" and "Territorial Sea".....   | 134 |
| II.  | There is no agreed definition of the juridical status of the territorial waters.....  | 135 |
| III. | While it is admitted that a State exercises sovereign rights over territorial waters, the apparent restrictions imposed have led to the sovereignty being described as qualified or restricted..... | 136 |
| IV.  | Lapradelle's theory of the coastal State's rights being merely a 'bundle of servitudes' upon the territorial waters.....  | 136 |
| V.   | The doctrine of servitudes in international law is<br>not/  |     |

not universally accepted by publicists.

- VI. Diverse criteria have been suggested for the recognition of servitude rights.....138
- VII. The decisions of international arbitration tribunals afford some guidance .....139
- VIII. Lapradelle's theory is open to criticism on three grounds: (1) it ignores the historical development of State right in territorial waters, (2) the doctrine of servitudes is inapplicable to territorial waters, and (3) the mere listing of the rights of a State upon its territorial waters is unsatisfactory.....139
- IX. Fauchille's "systeme du droit de conservation" emphasis the purpose of the rights exercised by the State but he asks it to bear too great a burden as an exhaustive definition of the juridical status of territorial waters.....140
- X. His theory cannot be reconciled with the universally accepted rules of international law as to the duties of a neutral State.....142
- XI. Nor can the theory be reconciled with the practices of many maritime States in regard to the contiguous zone as distinct from and in addition to the belt of territorial waters. The theory is therefore rejected as inadequate.....142
- XII. The above theories rest upon the erroneous basis that the coastal waters cannot be appropriated...143
- XIII. Other theories are that the State has the right of sovereignty or the right of property in the territorial waters.....145
- XIV. The theory of the right of property is tenable.....145
- XV. But has been rejected by some publicists. The grounds for rejection, however, appear to be unsound. The term "property" is liable to misconstruction.....146
- XVI. The State certainly exercises the right of sovereignty upon the territorial waters. The derogations therefrom or restriction thereon are imposed by law.....151
- XVII. The theory of sovereignty has received the support of the majority of the publicists. Those who reject the theory stress the restrictions upon the right/



- right of the State until they would obscure the sovereign capacity in which the State is acting.....152
- XVIII. The conception of an absolute sovereignty which these jurists postulate does not exist: international, imposes duties as well as rights.....153
- XIX. The opinion is advanced that the most appropriate definition of the juridical status of territorial waters is that they are under the territorial sovereignty of the adjacent State..157
- XX. This theory of territorial sovereignty serves to distinguish the contiguous zone from the territorial waters proper.....158
- XXI. The special requirements as to the exercise of a jurisdiction in the contiguous zone do not admit of hard and fast regulation but a jurisdiction may be tolerated in particular instances by the comity of nations.....158
- XXII. It is deduced from the acts of the Great Powers that the contiguous zone does not form part of the territorial waters and that special rights in the contiguous zone can be obtained only by express agreement.....160
- XXIII. It has been objected to the theory of territorial sovereignty that there is no natural boundary to territorial waters but this requirement is not universally applied even to the domain of the land.....163
- XXIV. Fauchille's "eight heads" of objection to the theory of territorial sovereignty.....164
- XXV. The objections based on the right of innocent navigation which all nations enjoy are invalid as the interests of the coastal State are not prejudiced nor does it involve a substantial restriction upon the sovereign rights of the State which retains a right of control.....165
- XXVI. The objection that a State cannot exercise a criminal or civil jurisdiction over passing vessels is invalid as States do, in their discretion, claim and exercise such jurisdiction 167
- XXVII. Other minor objections advanced by Fauchille are/

- are rejected as being without point.....169
- XXVIII. The inalienability of territorial waters, another ground of objection to the theory of territorial sovereignty, is due to the peculiar jural relationship between the territorial waters and the land domain.....169
- XXIX. It is concluded that the only adequate theory is that the territorial waters have the same juridical status as the land domain, that is, they are under the territorial sovereignty of the adjacent State.....170
- XXX. The application of this theory may be illustrated by two early opinions of the Supreme Court of the United States.....171
- XXXI. These are corroborated by the opinions of Lord Stowell in England.....172
- XXXII. Direct evidence is afforded by the fact that it is only the neutral State which can found upon the violation of its neutrality and declare captures in its waters void.....172
- XXXIII. The distinction between the right of territorial sovereignty and the sovereign right of State protection is brought out by the incident of the Kearsage..... 174
- XXIV. The published opinions of American statesmen are insistent upon the right of territorial sovereignty and these are supported by a recent decision of the Supreme Court.....175
- XXV. The most authoritative British view is contained in the Territorial Waters Jurisdiction Act, which is founded upon the right of territorial sovereignty upon territorial waters.....175
- XXVI. The Act may be held to be the considered view of the British Government which is the jurisdiction on territorial waters is territorial and, in so far as a jurisdiction may be exercised beyond these limits, it is personal.....176
- XXXVII. Post European War treaties and conventions support the view of territorial sovereignty upon the territorial waters.....177
- X XXXVIII. The treaties and conventions relating to international/



international air navigation affirm the principle that the sovereignty of States extends to the air over the territorial waters.....178

XXXIX. On the above evidence it is held that the right of territorial sovereignty upon territorial waters is substantiated.....179

## Chapter IV.

### The extent of territorial waters.

I. An indication of the scope of the treatment of the subject in this essay.....180

### Section A.

#### The Marginal Sea.

I. The general principles determining the extent of territorial waters are indicated by two extracts from opinions of jurists.....180

II. In the earliest period different limits of jurisdiction in the marginal seas were adopted for particular purposes.....181

III. While there was unanimity for the restriction of territorial waters the difficulty was the absence of a natural boundary.....182

IV. The range of cannon was adopted by some European States as determining the limit of territorial waters for the purposes of neutrality.....183

V. The earliest American view was tentatively in favour of a limit of three miles.....183

VI. This limit was introduced by Lord Stowell into English Prize Law.....184

VII. In the negotiations with the United States as to the liberty of fishing in Canadian and Newfoundland waters wider limits were suggested by Britain but eventually the right of fishing there was conceded with but little restriction as to locality. 185

VIII. After the war of 1812-14 the three mile limit was proposed/

- proposed for these waters but in the end the right of fishing was conceded with that limit applicable in specified areas only. The treaty of 1818 did not settle the limit of territorial waters.....185
- IX. The three mile limit was maintained by Britain against the United States in the Falkland Islands.....186
- X. Later, however, neither Britain nor the United States founded upon the three mile limit in the negotiations with Russia as to the Behring Sea sealing area.....187
- XI. Both nations refused to concede an extension of territorial waters to Spain in respect of Cuban waters. The United States suggested a five mile limit but later claimed for itself a greater limit in the Behring Sea. The terms of reference to the Arbitration Tribunal, however, accepted the three mile limit as applicable.....188
- XII. As between the United States and Britain the three mile limit has been assumed as binding.....189
- XIII. The Scandinavian countries claim a limit of four miles on account of special geographical and economic circumstances.....190
- XIV. The practice of France appears to have been inconsistent.....192
- XV. Portugal and Spain, for reasons similar to those of the Scandinavian countries, claim a belt of territorial waters of six miles.....193
- XVI. British opinion and policy appear to be strongly in favour of the three miles limit.....193
- XVII. There are many dicta in the opinions of the municipal Courts in favour of the three mile limit, but, being obiter as to international law, they are not founded upon as declaratory of the law.194
- XVIII. The three mile limit appears in the fishery conventions with France. In 1848 the Board of Trade denied the right of any foreigner to fish within three miles of the coast of Scotland.....196
- XIX. On the other hand, care was taken not to define the/  
the/

- the exact limit of territorial waters in the Territorial Waters Jurisdiction Act, 1878.....197
- XX. The policy of the British government was to fix definite limits for specific purposes only....197
- XXI. The North Sea Convention indirectly determined the limit of territorial waters on the east coast of the British Isles for the purposes of fishing.....198
- XXII. Elsewhere on the Scottish coasts no special rights have been conferred by treaty.....200
- XXIII. The Merchant Shipping Act, 1894, continues the policy of fixing limits for a particular purposes.....200
- XXIV. Recent events suggest that Briatin has adopted the three mile limit of terreitiorial waters for all purposes.....201
- XXV. Nevertheless the three mile limit is not a rule of international law.....202
- XXVI. The datum line - "low water mark".....202
- XXVII. Islands and dependent banks are to be reckoned part of the territory.....203
- XXVIII. The peculiar datum line adopted by Norway.....203
- XXIX. Lighthouses may be considered as part of the territory for the purposes of the datum line.204
- XXX. Lightships are not to be regarded as forming part of the territory.....204
- XXXI. Can the territorial waters be extended?.....206
- XXXII. The British policy is to grant treaty rights in the contiguous zone.....207
- XXXIII. The restriction of territorial waters to a narrow belt ex adverso of the State rests entirely upon accepted usage and not upon any scientific basis. Territorial waters may be extended only with the consent, express or implied, of all the other interested States..208



## Section B.

## The Scottish Firths.

- I. The territoriality of bays is of importance to Scotland.....209
- II. The controversy as to the freedom of the seas did not extend to bays and the appropriation of these was left to the discretion of the local sovereign.....210
- III. The questions which have arisen as to bays ultimately depend for their solution upon the extent or size of the bay which may be appropriated..... 211
- IV. There is no rule of international law upon this issue. Various criteria have been suggested..211
- V. Nor are jurists unanimous.....212
- VI. The ordinary limits of territorial waters, when applied to bays, are unsatisfactory. Conventional datum lines have been adopted for bays to surmount the difficulty.....213
- VII. The root of the problem is the variety in the practice of States.....214
- VIII. The proclamations as to the King's Chambers in England and the Law of Scotland as found in Stair appropriated bays within well marked headlands.....214
- IX. Hale, in his De Jure Maris, does not represent international law or practice of States.....215
- X. If the instances of the appropriation of large bays in Europe and America be considered legitimate, the decision of the Court in the case of Mortensen v Peters holding the Moray Firth to be a territorial bay was sound in law.215
- XI. There is, however, other material evidence from which the British policy may be ascertained..217
- XII. The ancient claims to the King's Chambers would not now be asserted.....217
- XIII. The historic bays:- Delaware, Chesapeake, and Conception Bays.....218



- XIV. The tendency to restrict claims to the smaller bays is observed in the conventions relating to the fisheries in the North Sea.....219
- XV. The North Atlantic Fisheries Arbitration Tribunal adopted the rule as to bays from these conventions as applicable between the United Kingdom and the United States but not as a rule of international law.....220
- XVI. The exclusive fishery limits stated in the North Sea Convention were not coincident with the limits of territorial waters and the municipal legislation regulating the methods of fishery beyond these limits was not contrary to international law.....221
- XVII. The Moray Firth was declared by the High Court of Justiciary to be a territorial bay.....222
- XVIII. The executive, however, declined to give effect to this finding.....224
- XIX. As confirming the policy of the executive, reference is made to the declaration of the Attorney General in the Fagernes case, where sovereignty over the former King's Chambers was renounced..226.
- XX. There has been no authoritative statement of the limits of territorial sovereignty in Scottish waters.....226
- XXI. But the inference is that only the minimum claimed by any other State would be claimed by Britain in respect of the Scottish Firths...227

## Chapter V.

### State Jurisdiction in Territorial Waters in time of peace.

- I. The general purposes of the jurisdiction are noted together with the tendency to accord the utmost freedom of navigation.....228
- II. The restrictions imposed upon the jurisdiction are not antagonistic to the interests of the local sovereign.....228

- III. Distinctions drawn between 'jurisdiction' and 'control' and the divisions of territorial waters into zones for particular purposes are unnecessary, misleading and invalid.....229
- IV. The exercise of a jurisdiction is within the discretion of the riparian sovereign. This may be illustrated by American opinions.....230
- V. Which are supported by British and French municipal law.....230
- VI. This jus merae facultatis is the basis of the theory of those jurists who do not admit the exclusive sovereignty over territorial waters.....231.
- VII. The controlling factor is the degree of interest of the riparian sovereign.....231
- VIII. A ship is not a floating portion of the territory of the flag State.....232
- IX. By voluntary entrance into the territorial waters of another Power a ship impliedly accepts the local jurisdiction.....233
- X. This view is accepted by Britain which claims a concurrent jurisdiction.....234
- XI. The local regulations are designed in the interests of shipping and of the State.....235
- XII. It may be doubted, however, how far a State may interfere with the interior economy of a vessel of a foreign State, but in all probability the right is admitted.....235
- XIII. Ships entering territorial waters in distress are exempt from the local jurisdiction but the right may be lost in certain circumstances. 237
- XIV. A criminal jurisdiction is denied by some jurists but, while seldom exercised, the right appears to be well founded.....237
- XV. Offences which have effect beyond the ship are instances where the State may clearly act....238
- XVI. This matter is frequently regulated by treaty or municipal law but there is usually a wide discretion allowed to the State.....239
- XVII./

- XVII. It is contended, therefore, that the jurisdiction is absolute and exclusive but the exercise thereof is discretionary except in certain circumstances., 240
- XVIII. The right of hot pursuit is ancillary to the jurisdiction over territorial waters..... 240
- XIX. The salient conditions for the exercise of this right are given by Hall and others..... 241
- XX. It has been doubted whether this right is a right in law or merely permitted by the comity of nations..... 242
- XXI. But the basis of the objection would appear to be illfounded..... 242
- XXII. The right has been extended to cover acts of a vessel "constructively present" in territorial waters..... 243
- XXIII. "Constructive presence" became important in the enforcement of the American prohibition laws..... 244
- XXIV. While the decisions of the American Courts would appear to be open to criticism the executive adhered to the recognised rules of international law..... 244
- XXV. Enquiry may be suggested as to whether the rules affecting the exercise of the right of hot pursuit are suitable in present circumstances. The extension of a territorial jurisdiction by treaty provision for particular purposes would appear to be the solution..... 247
- XXVI. The principal restriction upon the right of exclusive territorial sovereignty upon territorial waters is the right of foreign merchantmen to "innocent passage". The right is justified by the world wide interest in the freedom of navigation and commerce..... 248
- XXVII. The importance of the right, however, may be overrated..... 248
- XXVIII. The right of innocent passage is limited to cover only those ships merely passing through the territorial waters, neither anchoring there nor touching at any of the ports of the riparian State..... 249
- XXIX. A State may not levy dues upon passing shipping except for specific services rendered to the vessel/



|  |     |
|--|-----|
| vessel.....  | 249 |
| XXX. The passing ship, however, is not altogether exempt from local regulation and the right of innocent passage may be easily lost.....   | 250 |
| XXXI. In effect, the right of innocent passage is not a substantial derogation from the right of sovereignty upon the territorial waters.....  | 251 |
| XXXII. There is a difference of opinion as to whether a warship also enjoys the right of innocent passage.....   | 251 |
| XXXIII. The grounds of special treatment accorded to foreign warships is that they form part of the armed forces of an independent sovereign and they are admitted to territorial waters only on licence. .... | 252 |
| XXXIV. Warships are to be treated with the respect due to such a sovereign and are exempt from judicial process.....   | 253 |
| XXXV. The fiction of the extraterritoriality of the vessel is unacceptable.....  | 253 |
| XXXVI. A foreign warship cannot afford an asylum to fugitives from justice but may afford protection to political refugees.....  | 254 |
| XXXVII. Government trading ships are assimilated to public ships by some States.....   | 254 |
| XXXVIII. From a review of the practice of States it would appear that there is no rule of international law.....   | 256 |
| XXXIX. Government vessels engaged upon scientific and humanitarian missions are exempt from the local jurisdiction.....  | 257 |

## Chapter VI.

### State Jurisdiction in Territorial Waters in time of War.

- I. The territorial waters of a belligerent vis-à-vis the other belligerent are indistinguishable from the high seas. In respect to neutrals the territorial jurisdiction may become very real..258

II./



- II. The law of neutrality is subject to change and development with each succeeding war.....259
- III. While the modern law is dated from the French Revolutionary Wars, a rudimentary conception of neutrality was evident before that time.....260
- IV. The conception of strict impartiality was gradually developed by jurists.....260
- V. The condition of neutrality requires a strict impartiality and acquiescence in the rights of the belligerents. It reached its highest expression in the Hague Conventions of 1907 since which time there has been an apparent retrogression towards the former degrees of neutrality.....262
- VI. Oppenheim's definition of neutrality is accepted as the most comprehensive.....263
- VII. The neutral State is entitled to require that its territory be respected by the belligerents.....263
- VIII. The neutral State may take measures to safeguard its territorial waters but not to the unilateral advantage of one of the belligerents..... 265
- IX. The neutral whose territory has been violated may demand reparation.....266
- X. In the case of prizes taken in neutral territorial waters, as it is only the neutral sovereignty which has to be vindicated, simple restitution of the prize is all that may be required.....267
- XI. While neutrality confers rights it also imposes duties upon the neutral State.....269
- XII. The neutral State may prescribe rules to be observed by those within its jurisdiction. The British and American neutrality laws are referred to as examples.....270
- XIII. The practice of States is not uniform and the ultimate standard of conduct required of neutral States is that demanded by international law.....271
- XIV. The principal obligations of the neutral State are (a) a strict impartiality, (b) prevention of the use of the territory as a base of operations, /

- operations, and (c) the prevention of assistance being rendered therefrom for proximate acts of war.....271
- XV. The development is noted of the rule of neutrality prohibiting the fitting out of belligerent ships in neutral ports and waters.....273
- XVI. The amount of quasi-military stores which may be supplied to a belligerent vessel in neutral waters is limited.....275
- XVII. Prize Courts may not be established within a neutral jurisdiction.....277
- XVIII. Nor may signalling stations or other means of communication be established or used for transmitting military information from neutral territory.....278
- XIX. A neutral State is not bound to afford an asylum to belligerents but, if granted, it must be impartially. The duration of the stay of belligerent vessels in neutral waters and the repairs which may be effected may be regulated.278
- XX. The neutrality of a State is not violated by the mere passage of a belligerent vessel through the territorial waters. Submarines present a special difficulty which has not been approached with uniformity of method.....279
- XXI. The rule of twentyfour hours' interval.....280
- XXII. Prizes may be admitted to neutral ports and waters but the practice of States is not uniform.....281
- XXIII. The measure of the obligation of the neutral State is to use all the means at its disposal for the prevention of violation of its neutrality.....282
- XXIV. Where a neutral fails to perform adequately its duty, the belligerent may vicariously enforce the respect for the neutrality.....283.
- XXV. The neutral may possibly be relieved of responsibility in certain circumstances.....284
- XXVI./

- XXVI. Vicarious enforcement and self-redress are illustrated by the cases of the Ryeshitilni and the Dresden.....285
- XXVII. The sanctions applicable in cases of failure on the part of the neutral to fulfil its obligations must be appropriate and may vary with the circumstances of each case but the ultimate sanction is the termination of the neutrality by a declaration of war against the neutral...286.

THE INTERNATIONAL LAW OF  
TERRITORIAL WATERS  
with special reference to the  
COASTS of SCOTLAND.

---

PART I.

---

Chapter I.

Section I.

I. International law admits the right of a State, part of whose natural boundary is the seashore, to exercise a jurisdiction upon the adjacent waters as if, though with qualifications, these marginal or coastal waters, termed territorial waters, were comprehended within the popularly accepted national boundaries. On the one hand, the rights comprised within this extended jurisdiction, their nature, and even the extent of the waters upon which there is a jurisdiction, are the subject of international controversy. On the other hand, by the universal consent of nations, it is settled that the high seas, that is the oceans apart from the territorial waters, are not subject to appropriation by any power as within its sovereignty or jurisdiction. Thus upon the high seas, a ship, in time of peace, is subject to the sole jurisdiction of the State whose flag she flies. Within the territorial waters of another State the ship is under the jurisdiction of that State

for/



for some, but by no means all, clearly defined or agreed, purposes and yet remains under the jurisdiction of her own State. Thus the problem may be stated: What are comprised within territorial waters, apart from inland waterways which are excluded from the present essay, and what rights reside in and what duties are imposed upon States claiming territorial waters?

II. This delimitation of the seas into territorial and extra-territorial waters, or high seas, was the compromise solution to the celebrated controversy as to the appropriation of the seas by the maritime powers, a controversy which raged from the Middle Ages to the close of the Napoleonic Wars when the pretensions to sovereignty upon the high seas were tacitly dropped. That controversy was justly celebrated for, at one time or another, <sup>(1)</sup> all the known oceans were claimed by States. Venice, the leading example of successful appropriation, secured the Adriatic; Genoa and Pisa contested the Ligurian Sea; Spain and Portugal divided the Atlantic and Pacific Oceans; Britain claimed the indefinite "British Seas"; and the Baltic formed a convenient appendage to Denmark and Sweden. The assertion and defence of these claims conditioned the whole course of European History and the victory of Mare Liberum laid the basis of modern maritime law. <sup>(2)</sup> The controversy attracted the attention of the great scholars, particularly <sup>those</sup> of the seventeenth and eighteenth centuries, who sparing no effort in ransacking the treasuries of ancient/

(1) Hall 178 s. 40; Craig, Jus Feudale<sup>v</sup>. Tit. 1. 15. 13.

(2) Hautefeuille Tit. I c.2

ancient literature, lore and poetry, the opinions of lawyers, history and fable, and even the Sacred Writ, sought to buttress with this heterogeneous material the side favoured, Mare Clausum (3) or Mare Liberum. It was a veritable "Battle of Books". For the moment, it is sufficient to indicate that these jurists dealt with the appropriation of the vast oceans and, in so far as they touched upon the coastal waters, they did so but lightly. Sovereignty upon the coastal waters was then neither a novelty nor the subject of controversy. It had been admitted by the earlier jurists and claimed and exercised by monarchs. Until the major issue, the extravagant claims to the wide oceans, had been disposed of, there would then have been but little point in dealing exhaustively with the narrow coastal waters. The distinction between the coastal waters and the open seas was properly made but not understood: the basic purposes and ultimate objects of the appropriation were different. Coastal territorial waters implied self-protection and fiscal advantage, appropriation of oceans was directed towards territorial aggrandisement and maritime monopoly. Consequently, the only relation between the two problems was the erroneous application of the juridical concepts concerning the marginal seas and bays to the dissimilar oceanic problem. Time, fortune, and reason have combined to quieten the controversy as to the appropriation of vast oceans where illogical methods failed to find a solution; but the issue of the territorial waters remains perennial to exercise the ingenuity of the publicist and to baffle the administrator. The object of this enquiry must therefore be directed/

(3) Nys. 260 et seq. Under the title, 'Une Bataille des livres'; Nys has given a pithy account of the controversy and contestants.

directed towards ascertaining the fundamental principles upon which the law relating to territorial waters rests. The present position is but a modification of the past to meet the changing circumstances of nations and thought: a final solution can be found only in principles applicable to all ages, in all continents, and universally accepted.

III. In view of these considerations it is proposed, in the first part of this essay to sketch the history of the claims to maritime dominion until the close of the controversy of Mare Liberum versus Mare Clausum and, in the second part, to consider the evolution of the problem of territorial waters with particular reference to the coastal waters of Scotland.

- - - - -

## Section II.

### THE EARLY MEDITERRANEAN CLAIMS TO MARITIME DOMINION.

-----

I. The Rhodian sea laws and the maritime legislation of the Greeks, as now available, are silent as to the status of the sea. The strongest argument against dominion on the sea was that this conception came much later. The root of the prevailing conception of the State was citizenship, not territoriality, a conception which did not become familiar until centuries later. It appears that the main military interest of these early/

---

(1) Walker. 43.

(2) do. 43. s. 27.

early communities in the sea, apart from exigencies of naval warfare, was the securing of the safety of the sea to the commerce essential for the economic welfare of the ancient Greek communities. Safety on the sea involved the suppression of piracy, then popularly regarded as with all early maritime communities, as a glorious means of enrichment for the chiefs (3) and a provision for needy followers. The injunction to repress piracy was laid by the Amphiktionic Council not upon particular States but generally upon all. (4) The Greek community of States forming the League recognised obligations inter se as (5) States; but the Greeks were not conscious of them as rules of interstate obligation: they regarded them as rules applicable to all the Hellenes, common to all, like their civilisation, language and religion. (6)

II. About twenty instances of the exercise of a dominion upon the seas by the Mediterranean peoples of the pre-Roman period (7) are claimed by Selden, the leading advocate of mare Clausum, but these instances scarcely bear out his contention. Instances, as they were, of temporary naval supremacy or commercial prosperity cannot be transmuted into maritime dominion by the forensic power of the pleader in subsequent ages. To permit this it was necessary that the State, having the supremacy, should have both the will and the intention to assert

a/

- 
- (3) Phillipson vol. II. c. xxviii 368-370. (4) Walker 39.  
 (5) Wheaton-History 14, enumerates five points dealt with by the Amphiktionic Council which constituted the rudiments of Public Law.  
 (6) Walker. 42 & 43, and Pref. to 3rd edn. Wheaton - International Law. (7) Selden I. c. 9-11. Also Justice 40 et seq.



a dominion and that that will should have been made evident by some act recognised as at least tending to constitute dominion. There was, it is true, a sufficient number of independent States to have made possible a competition for the lordship of the sea, but the intention to acquire dominion upon the seas, apart from the harbours and their immediate vicinity, was lacking. It had come to be, as with the great Hellenic games under the auspices of the temples, that these localities were sanctuaries for the trader. The dues levied were utilised, in part at least, for the upkeep of the harbours, and in this respect they may be said to be the prototype of the modern harbour dues. Beyond the limits of the harbour the trader was probably unprotected. There no State had a special or exclusive jurisdiction.

III. The extension of the Roman Empire over virtually the whole of western civilisation rendered 'international' law impossible. Consequently the dicta of the Roman jurists as to the possibility of property in the sea, so confidently founded upon by the controversialists as to Mare Clausum, are scarcely relevant. Apart from there being a confusion of ideas of ownership and of sovereignty, there is no warrant for supposing that the jurists, the framers of the Edicts, or the Emperors, ever had in mind the possibility of there being a number of sovereign States claiming rights in maritime waters. /

---

(8) Walker 38 51. s.33. (9) Glotz 113.  
 (10) Walker. 58. s.37. and Preface to 3rd Edn. of Wheaton's Elements of International Law.

waters. They looked at the questions raised from a different  
 (11)  
 angle. The Civil Law was essentially municipal law, but by  
 reason of being almost universally accepted into, or as the  
 foundation of the municipal systems, it came, in the absence  
 of other doctrines, to furnish much of the material which  
 the States, with a growing consciousness of interstate oblig-  
 ations and rights, sought to incorporate into the rising  
 (12)  
 edifice of international law. The Civil Law was based on  
 citizenship: it was personal law as was all early law. When  
 the Civil Law came to influence the interstate relations it  
 was in an atmosphere different from that in which it had been  
 nurtured, in a feudalised Europe composed of sovereign or  
 virtually sovereign States. The Roman Empire, therefore, cannot  
 afford any material useful for the present purpose.

IV. Out of the anarchy prevailing after the disintegration  
 of the Roman Empire, there arose a situation peculiarly favour-  
 able to the assertion of claims to local jurisdictions, and  
 eventually to sovereignty on the seas. There were three con-  
 tributory causes. Although the Emperor of the Germans remained  
 (13)  
 the figure head of a "speculative sovereignty" and the Papal  
 See, out of regard to the spiritual welfare of Christendom,  
 attempted to gain a universal authority in matters temporal,  
 there was in fact no central authority adequate to replace the  
 (14)  
 Caesars. Feudalism, connecting for the first time personal  
 rights and duties with definite parcels of land, became  
 familiar, /

(11) D. I.I. & Inst. 1.1.42. (12) Maine C.IV.<sup>108</sup> and Notes p.120

(13) Maine. C.IV. 108; Camb. Med. Hist. V.120. & 121.

(14) Camb. Med. Hist. V. 212.

(15) familiar, and feudal jurisdictions, preceding local autonomy, waxed or waned inversely to the authority exercised by the titular sovereign power. (16) Finally, of prime importance for the purpose of this essay, there arose a series of competing maritime communities. Their origin and growth were conditioned by and reflected the advantages of geographical situation and the resurgence and expansion of commerce and industry to meet the needs of a wider civilisation. The absence of a powerful central, political authority and the other circumstances of the time required that Venice, Genoa, Pisa, Florence, Amalfi, progressive communities, should undertake their own (17) protection and shape their political and economic development. In the first place, shipping had to be protected from the depredations of pirates and, in the second, in accord with the economic ideas of the period, the commerce of the different regions had to be monopolised, so far as concessions could be obtained towards that end, or otherwise canalised by the State. There could have been no pretence at maritime sovereignty or exclusive jurisdiction upon the seas until the States had become familiar with the idea of exclusive State rights within (18) territorial limits by land. Consequently, only when there was some /

---

(15) Maine C. IV. 108 and Note.

(16) "Camb. Med. Hist. V. 121 & VI. Intro. x & xi."

(17) do. V. 226 as to the part played by the Italian sea-ports in the suppression of piracy.

(18) Maine C. IV. 108. "Territorial sovereignty - the view which connects sovereignty with the possession of a limited portion of the earth's surface - was distinctly an offshoot, though a tardy one of feudalism." (It is not to be supposed that the medieval lawyers were incapable of distinguishing between territorial sovereignty and feudal overlordship. Pollock's Note on p. 122)



some semblance of regional monopolization of commerce, or a State had claimed to have appropriated some portion of the sea as within its jurisdiction and protection, could maritime dominion, as distinct from naval supremacy, be admitted.

V. Of these earliest claims to maritime sovereignty there was none more prolonged, more firmly established or more highly prized by the advocates of Mare Clausum than that of Venice upon the Adriatic. Pisa and Genoa, her early rivals, laid some claim to the Ligurian Sea, but it was indefinite and less notorious. Sovereignty or, as it was at first, naval supremacy, was valued by the Venetians. Denied the heritage of the land, they perched their republic upon the mud banks and lagoons at the mouth of the Po and spread their dominion seawards. The Adriatic became peculiarly Venetian. Dues were levied and shipping regulated irrespective of its flag or character. Irritated by these obstructions other nations protested but Venice persisted in the maintenance of her claims to maritime dominion. With time and circumstance taking toll, the Venetian naval power declined and the throng melted from the Rialto, yet Venice could still claim fealty as the enthroned "Queen of the Adriatic". Her naval supremacy had matured to maritime dominion in the modern sense and was recognised as such by the Powers.

VI. The first step towards the acquisition of this control upon the Adriatic was when Doge Orseolo II, about the year 1000, cleared the Dalmatian pirates from the Adriatic and Venice established a protectorate over the Greek Dalmatian cities./



cities. Her approaches thus secured, the wealth of Venice grew apace.<sup>(19)</sup> It is from 1204, however, that her splendour is usually dated for Venice then shared lavishly in the spoils of Constantinople. About that time too she acquired the Ionian Isles and Candia. The latter she granted out to Venetian nobles on a form of feudal tenure probably learned from the Frankish crusaders. It is during this period, if a date must be assigned, that the Venetian aspirations to maritime sovereignty made their first appearance. The newly acquired islands formed a convenient base from which to control the Adriatic traffic. Moreover, trade became canalised. Genoa held the trade of the Euxine in her hand; Venice directed her commerce to Acre and Alexandria. Both and Pisa also, held in Syrian towns concessions not dissimilar to the Scottish staple at Campvere or the Hanseatic centres at Bruges and London.<sup>(20)</sup> in 1265 Venice took the far reaching step of legislating for and levying dues on the shipping upon the Adriatic.<sup>(21)</sup> Nine years later Ancona complained that Venice had usurped the sovereignty of the Adriatic without justification. The upshot was that the Pope recommended Venice to the guardianship of the Adriatic against all pirates and disturbers of the peace and authorised the levying of dues to defray the cost.<sup>(22)</sup> The annual pagentry of the espousal of the sea by Venice 'in real and perpetual dominion' as a symbol of the dominion of Venice upon the Adriatic/

(19) Heyd vol.1. 115.

(20) Camb. Med. Hist. V. 328 et seq. & VI. 474. & VII. 60.

(21) Justice 72? (22) Justice gives a résumé of the arguments used in this case and also the evidence in favour of Venice. He omits mention of the opposition with which Venice had to contend. (Camb. Med. Hist. VII.60.)

Adriatic must be mentioned. A symbol, in an age when symbolism was established in the more solemn engagements under Church and State, the ritual symbolised, in truth, the very real dependence of Venice upon the Adriatic for continued prosperity.

VII. The salient features of this Venetian appropriation of the Adriatic were : (a) there was an interest vital to Venice in maritime commerce, (b) naval supremacy was a necessary safeguard for that commerce, and (c) the Adriatic Gulf was an easily defined and controlled area at the very threshold of the Republic. The jurists of that period, recognising the novelty and its possible permanency, sought to expand their jurisprudence to formulate principles which should govern the claims of all seaboard States. The juridical position of open seaboard States could not be deduced easily from the precedent of the almost landlocked Adriatic. Jurists disagreed and still disagree as to the seaward limit of territorial waters. The early attempts to attain certainty suggested limits which clearly were intended to afford the seaboard State a jurisdiction over the waters used by shipping, then chiefly coastal. Beyond that belt no innocent shipping willingly passed and the high seas were ~~interit~~ a waste of waters. Only when shipping was equipped with the later inventions and assisted by increased knowledge, did mariners tempt the unknown beyond the coastal waters: only then could any contest arise as to Mare Clausum or Mare Liberum: only when the Papacy divided the unknown New World amongst the faithful did the issue become important - and absurd.

Section      III.

THE EARLY SCANDINAVIAN CLAIMS TO  
MARITIME DOMINION.

I. The Baltic played much the same part in the development of medieval commerce in the north of Europe as the Mediterranean in the south and was likewise the object of claims by States. Less spectacular than those of Venice, and almost as indefinite as those of Pisa and Genoa, these Scandinavian claims yet merit notice here for it was rather from the practice of the northern States than from the southern that Scotland drew her inspiration for maritime dominion. Proximity to the trading centres of the Baltic and the Low Countries induced the overseas trade of Scotland thither and the Scandinavian descent of the population of the Orkney Islands, the Hebrides, and the northern counties facilitated the percolation of Scandinavian conceptions and customs into Scottish thought and practice.

II. The Scandinavian claims like the Mediterranean illustrate the two requisites for the initiation of the early claims to maritime dominion, viz., economic dependence of the population upon the sea and the dawning consciousness of the conception of territorial jurisdiction. The situation near the sea of such towns as Hamburg and Lübeck at points affording easy access for commerce to the hinterland, and the central situation of Wisby on the island of Gothland, convenient as it was for trade with both north and south shores of the Baltic, point to considerable/

---

(1) Heyd vol. 1. 87.



considerable maritime commerce. The widely scattered trading centres established by the Hanse towns and the concessions obtained in England, Flanders, Norway, Sweden and Novgorod in Russia indicate the international importance of that commerce. The power and the influence wielded by the Hanseatic League and its members during a chequered career<sup>(3)</sup> vouch the wealth derived from that commerce which depended largely upon the lucrative fisheries of Scania. Skanör and Falsterbo were thriving markets existing primarily for the herring fishery, and the cod fisheries of northern Norway supported the city of<sup>(4)</sup> Bergen. The other essentials for these claims to maritime dominion, the conception of territorial jurisdiction, may, as in the instance of Venice, be attributed to feudalism. The Waldemarian century (1157- 1241) has been accepted as marking as near as may be the inception of a feudal organisation in Denmark; somewhat later the roots of feudalism were established<sup>(5)</sup> in Sweden and Norway. About this time too the Scandinavian countries entered European commerce on a large scale and the introduction of the big staples marked the rudimentary regulation of the trade. Thus the time was ripe for the initiation of Scandinavian claims to maritime dominion.

(2) Camb. Med. Hist. VII. 216. (3) do. VI. 130<sup>v</sup> & VII c.viii

✓ (4) do. VI. 391

^ (5) do. VI. 385 et seq. As to the early geographical division of jurisdictions in Norway, see Larson. Apparently the shore fisheries were early appropriated and, by an enactment of the beginning of the 12th century, it would seem that tithe fish were exacted at the Lofoten Isles (pp. 397 & 404). The Gulathing Law and the Frostathing Law are in essentials personal law but with glimmerings of rights in settled property pointing to territorial jurisdictions.

*See also Appendix 24.*



III. The earliest definite trading concessions were obtained only after the thirteenth century opened. Lübeck, one of the foremost towns on the southern shore, obtained trading privileges (6) in 1247 from Hacon, King of Norway, from Eric, King of Denmark, in 1259 and in Sweden in 1261. Between the granting of these privileges and the mature claims to maritime jurisdictions there was indeed the gap of the centuries to measure the rate of progress. First, in 1287, there was an "invitation" extended by King Hacon to the merchants of the "Slav States" to come and trade; then in the following year a grant to the Hanse towns to take fish (7) on payment of dues according to treaty is noted. In 1292, Eric of Norway granted safe conducts to the citizens of Bremen in return (8) for a tithe on each last of herring. There is no evidence in the grants themselves or in the conditions attached, to suggest any immediate intention to claim a jurisdiction over great stretches of water. Safe conducts whether general or special and licences to trade afforded/

---

(6) Thorkelin II 36 gives date of charter as 1250.

(7) See note (5); Camb. Med. Hist. VI. 129 and 391 and Thorkelin II. 111 & 114. "Quo a telonii solutione, quae in captura halecium fieri solet, eximuntur, donec pecunia a Norwegiis dictis civitatibus secundum foedum Calmoriae factum debita numerata fuerit".

Tonlieu or teloneum confiscated for the use of the lord or territorial ruler part of all the merchandise transported by land or water was a feudal due.... a manifestation of the primitive economy of the locality. Camb. Med. Hist. VI. 515.

(8) Thorkelin II. 131. "Quibus theloneum quinque denariorum sterlinii pro singulis allecium lastis solvi jubet". Examples of safe conducts to the Hanse Towns are given on p. 147 of Thorkelin. (1294)

ex afforded some slight security to the alien trader and therefore were of commercial value to him and a source of income for the granter. The fact that the Hansa League later resorted successfully to war against Waldemar III (Atterdag) (1340 -1375) of Denmark when he levied the Sound dues and threatened the Scanian fisheries is evidence of the importance attached to peace for commerce. (8a) Before the sixteenth century had closed there were definitely matured claims to maritime dominion distinguished by the attributes of sovereignty, viz., prohibition of navigation except to those privileged by grant and the levying of dues for licences to fish. In 1415, Henry V of England, at the request of Eric, King of Norway, prohibited his subjects, on account of the injuries done to the inhabitants, from going to Iceland or to other islands belonging to the King of Norway and Denmark, and (9) not until 1490, when a treaty was negotiated, (10) were the English again permitted to sail freely, to fish and to trade subject to the payment of dues. What may be deemed a confirmation of the admission of these Norwegian claims was made in 1585 by Queen Elizabeth, when, on the representations of the King of Denmark, as to the conduct of her subjects, she, by Order in Council, warned them that the licences to fish would be withdrawn and those fishing without them punished. Her subjects were informed that the King was prepared to continue their privilege on condition/

(8a) Previté-Orton. 186 & 184.

(10) Foedera xii. 381 ^

~(9) Foedera ix. 322.

(11) S.P. Dom. Eliz. clxxx.26

condition that the excesses ceased, the licences renewed every  
 (11)  
 seventh year, and, of course, payment of the dues. This admission  
 of the claims of Denmark was of great significance, as shortly  
 afterwards Elizabeth was called upon to deny the right of any  
 (12)  
 prince to appropriate the sea.

IV. A letter dated 1562, from Eric XIV, King of Sweden, is  
 (13)  
 illustrative of the maturity of the claims of that day. The  
 burden of the letter is a complaint to Mary, Queen of Scots,  
 that merchants of her realm had penetrated into the upper reaches  
 of the Baltic, an innovation and an encroachment on the rights  
 of other communities - contra veterem consuetudinem et civitatum  
aliquarum privilegia. The object of the prohibition, it would  
 appear, was to conserve the privileges of the staple ports of  
 Reval and Wiborg. But a definite claim to sovereignty is also  
 advanced, to translate very freely, viz., that our writ "may  
 run no less upon the sea adjacent to our dominions than upon the  
 land, and that we may legislate without hindrance for the needs  
 and the advantage of us and ours". - "ius ac potestas sit, non  
minus in mare, quod ad nostrum spectat dominium, quam in terra,  
nobis nostrumque incomodum et utilitatem, libere ordinandi ac  
disponendi."

V. These northern claims have been summarised as follows:

Denmark and Sweden, and later Poland, contended for or shared in  
 the dominion of the Baltic. The Sound and the Belts fell into  
 the possession of Denmark, the Bothnian Gulf passed under the  
 rule of Sweden; and all the northern seas between Norway on the  
 one/



one hand, and the Shetland Isles, Iceland, Greenland and Spitzbergen on the other, were claimed by Norway and later by Denmark .... The Scandinavian claims to maritime dominion are probably the most important in history. They led to several wars; they were the cause of many international treaties and of innumerable disputes about fishery, trading and navigation; they were the last to be abandoned."<sup>(14)</sup>

#### Section IV.

I. It has not been considered necessary to enter minutely into these Scandinavian and Mediterranean claims to maritime dominion: but recognised it must be that they were the outcome of economic and political circumstances of the time. Differences in detail there were. The Mediterranean region had cradled European civilisation; the Baltic peoples had been but recently admitted within the pale of European States. The historical backgrounds differed; there were racial differences and no common tradition; the Mediterranean and the Scandinavian groups were at the opposite sides of Europe. On the other hand there were common factors: the essential conditions for the initiation and assertion of claims to maritime dominion. Both the Mediterranean and the Baltic were important centres of maritime trade, the mainstay of the prosperity of these regions. Agriculture, as practised, could/



could not by itself support these progressive communities which existed primarily upon mercantile activity. On the ~~other~~<sup>one</sup> hand Venice and the other Italian seaports were the carriers between the East and the West and, on the other, the Baltic was the centre which supplied Catholic Europe with the fish and the products of the North.  
(1)

II. The force required to root out pirates, the ubiquitous enemy of mariners, was supplied at the instance of the King by local contribution. In Sweden it was called Leidang organised by 'ship districts', or roslag, "rowing law districts," The other Scandinavian States had similar district organisations. In England there was the familiar example of the Cinque Ports; in Scotland the burghs were under obligation to supply the necessary navy.  
(2) But these levies were essentially for service in the immediate neighbourhood and defence. State effort then being directed towards the control and protection of shipping primarily and most consistently in the adjacent seas and approaches, the locality, part of the bedrock of feudalism, became important, and hence, as the exercise of a state jurisdiction on land came to imply dominion in the particular locality, it was an easy step to regard these waters as specifically appropriated. Other reasoning reached the same conclusion. Feudal dues were the symbol of jurisdiction and, where a substantially absolute or ultimate superiority was claimed, of dominion and sovereignty also. Consequently, where the feudal due or theloneum was exacted in the form of a tithe of the fish or merchandise landed, it was

(1) See Map 66 to Camb. Med. Hist. (2) Camb. Med. Hist. VI. 372 ✓

an easy extension to dominion upon the fishing grounds also.

III. Thus there is in the origin of these Scandinavian claims certain characteristic essentials common to them and the Mediterranean claims. These essentials, we note, are (a) a considerable volume of maritime commerce or valuable fishing grounds in the area claimed - the subject of the right, and (b) the State claimed to exercise a jurisdiction, protective and/or fiscal, within the area evidencing the intention and the will to establish the right. Therefore, in considering the early Scottish claims to maritime dominion the presence or the absence of these phenomena will be of the greatest importance in proving or disproving the existence of a real maritime dominion in the coastal waters.

Chapter II.

## THE EARLY SCOTTISH CLAIMS.

I. It cannot be expected that Scotland, an almost seagirt outpost of European civilisation, would be uninfluenced by the example of the continental Powers in appropriating the adjacent coastal waters, if and when the conditions which gave rise to the continental appropriations were also present in Scotland. The measure of that continental influence would be the strength of the contact made between the Scots and their continental neighbours in maritime and related subjects. The national characteristics, the local factors, and the political and economic organisations also would be determinants in the reaction to that influence. It is felt that, in the study of the Scottish claims, there can be espied the personal or psychological factor in the attitude of the burghs and the physical factor in the economic and geographical circumstances of the country. The interplay of these can be discerned illustrating the natural growth of the Scottish claims, deeply rooted in the circumstances of time and place and affected by the past. Unfortunately, the available evidence bearing upon the earliest Scottish claims is of the scantiest. The casual and concomitant factors, local circumstances and continental influence, therefore, are of more than ordinary importance. If regard be had to these and to basic conditions, as shown by the Venetian and Scandinavian claims to maritime jurisdiction, it is possible to assess, in some measure, the earliest Scottish claims and the extent to which they formed the foundation for the definite assertion in the opening decade of the seventeenth century of the /



the reservation of the fisheries in the coastal waters. On the whole, it may be said, the evidence indicates that Scotland followed the example of those continental States with whose practice ~~it~~ <sup>it</sup> was most familiar and with which Scotland had most in common.

II. Scotland undoubtedly belonged to the family of European States. There was the common bond of allegiance to the Catholic Church; Civil Law as interpreted, the Canon Law and the various feudal customs <sup>(1)</sup> supplemented the local customary law. Of greater importance was the growing body of mercantile law or law of merchants, including maritime law, which, with but slight variation, from the necessity of an extending international commerce, was <sup>(2)</sup> being universally adopted. The towns were the pivot of commerce in the Middle Ages and, though the differences between them were deep and wide, they bore the family resemblance. A writer has remarked :-

"No more characteristic phenomenon of the prime of the Middle Ages can be found than the self-governing town. It existed, more or less fully developed, in the chief countries in the West, and we shall hardly err in attributing its rise and growth to economic causes of equally general prevalence. It was the resurgence of trade, of manufacture for a wide market, after the anarchic, miserable ninth and tenth centuries which produced town and townsman, merchant and craft. The conditions of the times imprinted on the medieval town other universal characters..... The associated burghers replaced or competed with the feudal or kinship groups which preceded them. Local and personal law was the rule and the law of the merchant and town took its place by the side of other local and class customs. Central Authority, in greater or less degree, was shattered, and the town, like the baron, obtained its fraction of autonomy. Whatever the degree of their independence, the shackled English boroughs, the French towns in all their variety /

- (1) Craig. Jus Feudale, 155; Erskine. 4. Stair. 4.1.16.  
 (2) As to the ancient maritime codes see Holdsworth 1. 526-530 Wheaton, 106. Walker. 116. For a collection of the ancient codes see Pardessus, Us et coutumes de la mer. There are several mss. copies of these codes, mostly fragments, in the University and National Libraries, Edinburgh. The handwriting is/



variety, the republics of Flanders and the Hanse, and the Italian "communes, obey the same impulse and bear the same family resemblance. (3)

Under so ample a description the Scottish burghs of the period prior to 1600 may be safely included. It came to be that in the hands of the burghs the bulk of the trade, home and foreign, was concentrated and subject to their almost unfettered restriction. (4) They sent missions to treat with foreign potentates for concessions for their burghers. (5) Inevitably, they must have learned from their travels and experience the practice of the continental States. Indeed conscious acceptance of continental standards is manifest for the Edinburgh Burgh Records commend the example of "Bruges and uther syclyk guid townes" in the matter of the precedence of the guilds, themselves a feature of the organisation of the continental town. Also, when an attempt was made to standardise the weights in use in the burghs, the French model was adopted. (6)

III. More germane to the present purpose, however, was the adoption referred to above of a body of maritime law and practice - "the law of the sey and the consuetude of the realme" - on all fours with that prevailing in the principal maritime States on the Continent. The process of adoption is disclosed in a statute of James I whereby the same law was to be observed towards shipwrecked strangers as was observed in their country towards Scotsmen. (8) Welwood, recognising the universal acceptance of such a body of

---

is that of the late 17th century, testifying to an increasing interest in the subject at that time. For a general statement of the law dispensed by the Scottish Admiralty Court see Intro. to Acta Curiae Admirallatus Scotiae.

- (3) Camb. Med. Hist. V. 208. (4) C.R.B. i. 21, 40, & 74; Grant 130 & 131  
 { Davidson and Gray Ch. II.  
 (5) P.C.R.S. iv. 169, 231; C.R.B. i. 16. The political alliance with/

of law, was able to collect the chief heads as far as he considered they had been adopted in Scotland -

"out of all the wrets authorizit be our nation I collectit briefly not only the remains of the Rhodian lawe as it is left interpret to us be the Romaine lawers with the reulis of Olon receavit be our cuntrey men bot also the acts of Parliament with uthers rests of the Romain Law concernand the Seafairing."

Welwod also refers to the admiral being the judge proper as to  
(9)  
crimes committed upon the sea and -

"as also be ye custome of uther natione quhom we follow in that erections judge in the civil causis bot without prejudice  
P of the lawis and consuetud foresaid." (10)

IV. In seeking to place Scotland within the ambit of the movement towards the appropriation of maritime waters and thereby to evaluate the scanty evidence as to the earliest Scottish claims, due allowance must be made for the comparatively slight connection with Continental States and also for the national characteristics which acted as a drag on the adoption of continental practices. In a country mainly agricultural in pursuits there would not be the same marked dependence upon foreign trade for the national prosperity which so actuated and distinguished the claims of Venice and ~~the~~ Scandinavia. The economic factor did not become prominent  
in/

- with France also enabled the burghs to obtain exemption from various imposts and restrictions upon aliens in that country. Moncrieff. p.30 & 31. *The Hamburg standard was taken for having measure*
- (6) Edinburgh Burgh Records i. 32; C.R.B. i. 76. Fleming i.11, 122 & 127.
- (7) Acta Curiae etc. 160 As to the general adoption of these codes throughout Europe see Heldsworth vol.1. ch.VI & VII, Twiss vol. IV. xxvi & xxvii, Walker s. 62. p. 116.
- (8) Scots Statutes. 1430. c.15. s.1.9; Bisset's Rolments ii.206.
- (9) The baillies of Crail fined a skipper for a crime committed on his vessel but the magistrates were in turn fined for usurping the jurisdiction of the Court of Admiralty.  
National Library. MSS. 6.2.1.

in Scotland until the dearth in the latter part of the sixteenth century. Fishing as a means of supplementing the national resources then attained unprecedented importance. The coastal burghs were intensely interested in the sea fisheries for a livelihood, as a source of gain and for the revenue to pay the burgh ferme to the royal treasury. They gave voice to the complaints as to the foreign competition, and, as the impoverished royal revenues were jeopardised, received a ready hearing. Further, privilege and monopoly ever permeated the whole of the burghal activities and therefore the urge to exclude the foreigner from the wealth which "Providence had placed at the nation's door" came naturally to the burghs.

V. The comparative unfamiliarity with the sea was manifested in another way. Undoubtedly the Scot was not a maritime adventurer in the same sense as the fishermen of England who sought the Banks of Newfoundland and the Icelandic waters or as the Elizabethan seamen who tempted fortune upon the Spanish Main. On the contrary, when emigration was ordered by proclamation to relieve distress at home, the Scot was content to peddle his wares through Germany and Poland or to seek military service abroad. The Scottish burghs set little store on naval strength. To the Scot piracy was an incidental means of gain, and the provision of convoys might/

---

(10) Welwood - Sea Law Tit. 15. The jurisdiction of the Admiralty Court was regulated in large measure by custom but was later subordinated by statute to the Court of Session. Scots Statutes. 1554. II. 449(b), 1592, c.79, iii. 580.

\*1609. c.22. iv. 440. as to jurisdiction of admiralty.

(11) Insh. Intro. (12) Fischer. 31.



might well be stipulated from their foreign clients.

VI. Conservatism was another characteristic of the burghs. Not only was the privilege of overseas trade restricted as to person and time, but <sup>commerce</sup> ~~it~~ was also canalised to flow mainly to the staple port on the Low Countries. This staple was the pivot of their foreign trade, and that medieval institution the Scottish burghs <sup>(14)</sup> maintained even until the Napoleonic Wars. In the matter of rights ~~in~~ the coastal waters these monopolistic minded burghs occupied the position of supreme importance. As a writer has said:-

"In all probability the burghs were the sole persons concerned in the question of rights in the territorial waters either as traders or as fishermen. It would then be no concern to the other Estates, the nobility or the Church, what were the rights in the matter." (15)

This conservatism of the burghs must have had some effect in delaying the formulation of definite claims to the coastal waters but, at the same time, it is to be expected that they would provide the first and the strongest impulse towards the appropriation of maritime waters for the purpose of fishing as a commercial asset.

VII. Considerable sea power, a phenomenon of maritime dominion ~~in~~ in its initial stages was lacking in Scotland. From the ninth to the twelfth centuries the lack of sea power laid Scotland open to invasion by the hardy Norsemen who established themselves for a time in the Western Isles and the counties north of the Moray Firth. Even a period of prosperity during the reign of David and his successor did not appear to mend matters, When the menace of <sup>piracy</sup>

---

✓(13) Yair 349. (14) Rooseboom 236. (15) Scots Statutes  
Preface by Cosmo Innes.



piracy was virulent it was decided that the merchant fleet should  
 not venture abroad but strangers should come to Scotland to trade.  
 (17)  
 The Scottish fleet would then be safe in harbour. Further, the  
 internal situation in Scotland was unfavourable to the creation  
 of a great sea power. The disputed succession to the throne, the  
 wars with England and the religious troubles turned the attention  
 of the King, the Nobility and the Church elsewhere than to the sea.  
 Robert, the Bruce, applied his mind to the building of a navy; yet  
 in the following reign it was necessary to hire Flemish skippers  
 from Berwick, and with the aid of a French squadron only were the  
 English driven off. The short but bright period under Sir Andrew  
 Wood brought some glamour and renown to a grateful country. The  
 Scots navy probably reached its highest development during the  
 reigns of James III and James VI. There was an alliance with  
 France, England was exhausted by the Wars of the Roses, and, by 1489,  
 it was reported that the Scottish seas had been cleared of  
 the English privateers. The duty of providing ships was laid  
 upon the burghs. The legislation of 1493 and 1502, requiring all  
 seaboard burghs to keep busses of not less than twenty tons, was  
 for naval as well as for fishery purposes. ~~and~~ The Scottish fleet  
 of 26 vessels all told during the campaign which ended in Flodden  
 in 1513 was quite ineffective. In the reign of Queen Mary there  
 was no Scottish fleet of importance and the Government required  
 to rely upon extra-governmental aid. No preparations were made  
 (18)  
 to meet any landing from the Armada in its progress round the  
 coasts/

(17) Davidson and Gray 47. ✓

(18) Chambers 1. 186 ✓

coasts and when the King went to Norway to bring home his bride  
 in 1569 he had to rely upon hired ships for a convoy. There was  
 no royal navy.

VIII. After the Union of the Crowns the same dismal tale must  
 be told of dependence upon others for the ships which should have  
 been supplied from the national resources. During the war between  
 England and Spain, Scotland was sorely distressed. Letters of  
 marque were issued and three ships bought but so ineffectively  
 used that in 1627 the Privy Council complained that the Dunkirkers  
 'sink our ships in the very sight of the coast and all the while  
 His Majesty's three war ships under the command of the Earl  
 Marishal have lain idle and unprofitable in dry harbour, without  
 any purpose as we conceive so to go to sea'.

IX. The repression of piracy off the national coasts elsewhere  
 afforded a basis for State claims to maritime dominion. These  
 claims generally were commensurate with the naval force available  
 and utilised. In like manner the Scottish public records frequent-  
 ly refer to pirates but only occasionally to serious effort for the  
 suppression of the menace. Indeed, circumstances tended to favour  
 rather than repress the evil. The inadequacy of the protection  
 afforded under the aegis of the Crown necessitated that the ship-  
 ping, unless under convoy as practised by the Dutch for their  
 fishing/

(20) For a resume of the history of the Scottish navy of this  
 period see Intro. 'Old Scots Navy'. (Navy Records Society)  
 (19) P.C.R.S. iv. 469 & 472

fishing fleets, should be adequately armed for defence. The unscrupulous skipper had thus placed in his hand a means of adding occasional gain as opportunity offered. Also, the practice of the time, due to the inability to secure certain justice from foreigners, allowed a species of private warfare under the authority of letters of marque. There was little to distinguish this retaliation from unrestrained piracy and treaties of peace were frequently endangered by these wanton reprisals between the merchants of different States. (22)

X. The measures taken to suppress piracy fell into two divisions. Into the first lot fell the remonstrances addressed to the sovereigns as having a personal jurisdiction over their subjects and a territorial jurisdiction within the ports. Into the second fell such measures as implied <sup>duty of</sup> active policing of the seas and, more particularly, the coastal belt, suggesting a territorial jurisdiction extended seawards. Those in the first division have no bearing upon this subject but the second class, in so far as it is supported by evidence, goes a considerable way towards founding a claim to maritime sovereignty. Regard must be had, however, to the efforts of individuals at self help and to the fact that pirates, being the common enemy of all nations, might be engaged outwith the areas over which the sovereign claimed or exercised a jurisdiction. (23)

XI/

(21) P.C.R.S. i. 39; Fulton. 70.

(22) Several remonstrances addressed to the Scottish Sovereign about this time (1540-50) G.R.H. 11.Q.4.12; Q. 7 & 8

(23) G.R.H. Letter from Christian III, King of Denmark, etc. to Mary, Queen of Scots, dated 24th May, 1547. 12. Q. 2.

XI. In Scotland, in this early period, the function of maintaining the security of shipping, that is the measures comprehended in the second division, appears to have been shared by the king and the burghs. The efforts of the two are best considered separately though, in fact, they were complementary, and at times scarcely distinguishable. The burghs as the Estate concerned with overseas trade might well express dismay at the growth of piracy. Their records express their concern:-

"daylie seeing the increas of troublis upon the merchantis of this realme be the occasioun of the slaknes of provisoun in resisting of the pyratys, quhais number and tyranny daylie increassis as saidis is, for the remeid quhairof, they all in ane voce consentis concludis and grantis ane generall extent."

not exceeding 3,000 merks for this and other purposes. On another occasion they contracted for a ship for one third of that sum. (24)

While these expeditions partake of the nature of private adventures and therefore do not in themselves lead to the foundation of claims to maritime dominion, yet, nevertheless, as the actions of the burghs might be reviewed in the Courts and Council, references to such instances are not to be ignored altogether. However, as the burghs were to put forward later the claim to reserved waters, a claim of major importance, the operations of the burghs may well be dealt with in that connection.

XII. There is clear evidence in the second half of the sixteenth century of distinct claims to a Scottish maritime jurisdiction. The /

---

(24) C.R.E. i. 27, 28, & 242. Several burghs failed to meet their obligations. ib. 286. Chambers i. 176."



The Privy Council, in 1550 considering:

"the gret enormities dailie done to our Soverane Ladyis legis, als wele within hir awin watteris and firthis as in uthair places, be schippis of Holand, Flussing, and uthiris the Lawlandis of Flandaris, subjectis to the Emprour, hes thoct expedient to licence the weir schippis of this realme sa mony as ar now in ordiner, to pas furth in weirfar for the stanchin thairof."

But they had to find caution that they would not pass

"na uther way bot upon the cost and throw the watteris of Scotland, quhill tha have owthir takyn or chasit the saidis piratis furth of the boundis forsaidis."

It is significant that the Privy Council were at pains to circumscribe the sphere of operations to Scottish waters.

(26)

The records of 37 years later note that the King and Council observed damage done by pirates:

"enemyis to the common quietnes of all nationis, nocht only againis the subjectis of this cuntrey, bot strangeiris brigand hame victuallis now in this tyme of derth and scairstie, the same pyratteis nocht spairing sumtymes to repair to His Majesteis awne watteris."

There is the persistent theme - His Majesty's waters.

XIII. The Treaty of Peace between the Emperor and the Queen in December, 1550, after referring to previous treaties, gives the prestige of sanction by a great Power to the Scottish claim to a coastal jurisdiction and, being contemporaneous with the expedition authorised by the Privy Council, has enhanced value on that account also. The subjects of either nation were to be allowed admission to the country of the other including the "harbours and bays whatever" without licence and on payment of dues. The Treaty further stipulated/

(25) P.C.R.S. i. 104. (26) do. iv. 195.

(27) C.R.B. ii. 568; S.P. (Spanish) x. 197. See Appendix N. <sup>4.</sup>

stipulated that:

"conform to a certain contract and agreement betwixt Mary, Queen of Hungary and Bohemia, and Governess of the Low Countries for His Imperial Majesty, and John Campbell, Ambassador of King James, lately deceased, anno 1541, and afterwards confirmed by the said King and both parties should be at pains, that the pirates should be wholly extirpate from the sea and the shores of the kingdom of either party, nor should they be received upon any terms into the lands or bounds of either party; and they should be bound to keep and defend the islands and districts of their jurisdiction against the incursion of whatever robbers or pirates by whom the subjects could any manner of way be damaged in their trading, navigation and fishing. And of those presumed to turn pirates, having no certain dwelling but betook themselves to desert islands or other unknown places, by whom the subjects of either prince, should receive damage, either party at the request of the other should be bound to betake themselves to common arms..... and the number and quality of ships to be furnished by the said princes when necessity required, should be treated and agreed to, and the fishing and the free use of the sea ought to be duly and sincerely observed conform to the said treaty of 19th February, 1541, betwixt the said Mary, Queen of Hungary and the Ambassador of the King of Scotland."

It would appear to be certain that the firths generally were regarded as within the jurisdiction of the sovereign of the adjacent territory. As early as 1484, <sup>for purposes of neutrality</sup> the King's Franchise (jurisdiction) and waters extended to the Isle of May in the Firth of Forth. (28) Mention is made frequently of 'fresh waters' in contradistinction to the open sea but apart from the above instance where the island afforded a convenient boundary mark there is nothing to indicate whether a large bay such as the Moray Firth could be comprehended within Scottish jurisdiction. In 1535, in another case, the phrase, 'into the firth (of Forth) and our souverane Lordis Wateris' is used identifying the jurisdiction with the Firth. (29)

XIV. /

- (28) Acts of the Lords of Council. 14th July, 1484. p.93.\*  
 (29) do. 23rd February, 1535/36 p.450.

In Stanes Laws of King Malcolm II c.8. the term "Scottes Sea" is used to identify the Firth. but no special mention is made of the use of this term.

XIV. Three years later, a ship was reported to have been taken 'out of the sea beside our sovereign lord's north ile callit the Fire Ile when at the fishing in our said sovereign Lord's north seais'.<sup>(30)</sup> In this latter instance the implication of a sovereignty over the seas is not conclusive evidence of jurisdiction. It was a case of piracy and a 'territorial' jurisdiction was therefore unnecessary. It is significant, <sup>we</sup> however, that the phrase "Sovereign Lord's North Seas" was used in reference to the seas near Shetland. The Shetland islands had been transferred as a wadset from Norway to Scotland. As the Scandinavian states claimed and exercised an intensive and extensive maritime sovereignty it would probably be ~~taken~~<sup>assumed</sup> that when the transfer became absolute the sovereignty went as a pertinent to the subjects. A later instance of a feudal grant in respect of the island straits is <sup>(31)</sup> recorded in 1597.

XV. But surmise cannot override authority on the point. Fortunately<sup>(32)</sup> the commission as Admiral granted to Earl Bothwell in 1587 is sufficiently detailed in regard to jurisdiction as to leave no doubt as to the intentions of the Crown and ~~to~~ removes doubts engendered by the above isolated instances. The maritime jurisdiction was to extend seaward for fifty miles round the coasts and to be not inferior to that of the admirals of France, Spain, Denmark and other countries. The limit of fifty miles is not of supreme importance; it was probably sufficient for the purposes of/

(30) Acts of the Lords of Council. 14th Jan. 1843, p. 93. x

(31) See Appendix A.

(32) Appendix A



of protection: the general tenor of the commission discloses the knowledge, the intention and the will to erect the Scottish Admiralty and maritime dominion to a level comparable with those prevailing in the leading maritime communities in Europe. This is so far satisfactory but the commission or more probably the wielding of the powers under it was too grandiose for the burghs and their remonstrance in 1590 against the sundry new exactions and usurpations of jurisdiction shows that they, who were particularly concerned, were not prepared for such an out and out adoption of continental practice and Bothwell's exactions in particular. In 1592 the jurisdiction of the Admiral was restricted to that which he possessed in the reign of James V. As to what that implied there is no primary evidence and we are thrown back upon the surmise as to the traditional or customary jurisdiction of the Scottish Admiralty in relation to territorial waters.

XVI. The most which can be legitimately deduced from the above is that during the second half of the sixteenth century the conception of a sovereign jurisdiction upon clearly defined smaller bays and coastal indentations was familiar and had been adopted to an indefinite extent into the municipal law of Scotland. The jurisdiction had been recognised, equally generally and indefinitely, in a treaty with a leading maritime power. A jurisdiction upon the marginal seas had also been similarly claimed and recognised but, in the absence of conclusive evidence, it would be unsafe to aver that that jurisdiction was, in fact mature and effective/

(33) Fulton 539 for a resume of the continental views at this period. (34) C.R.B. 1. 339. (35) Scots Statutes iii. 58  
 (34) contd. Edinburgh Burgh Records iv. 528, 530-1.



## Chapter III.

THE SCOTTISH CLAIMS TO RESERVED WATERS  
UNTIL 1603.

I. The feature of the Scottish claims to territorial waters, emphasizing their economic basis, was the reservation of the fishing in the firths and immediate coastal waters for the natives. It was repugnant to the monopolistic Scottish burghs to permit any alien to obtain sustenance and wealth from anything which could be claimed to be Scottish. The stranger had no more right, in fact none at all, to win riches from the sea around the Scottish coast than he had to share in the bounty of the soil. Consuetude, an important source of law, lent colour to the claim. The Scottish fishermen using light, one masted boats were confined to the comparatively safe inshore waters and sea lochs where the best herring fisheries were: the foreigners, especially the Dutch, using larger sea-going vessels, were able to operate in the open waters. There was thus an apparent division. Undoubtedly there were constant strife and bickerings between the local fishermen and the intruding foreigner in search of the migratory shoals but little could be achieved against the Hollanders without the assistance of the Crown. When, as already noted, a dearth came upon the land and the national resources were taxed, the cry went up that the foreigners were taking the substance which Providence had placed at the nation's door. The Privy Council were sympathetic. Further, the tax or assise of herring and the burgh tolls on the

merchandise/

merchandise were sources of revenue to the royal treasury or fisc. Thus the matter "touched the profit as well as the honour of the King". He also depended upon the fishing burghs for the satisfaction of his naval requirements.

II. Not indigenous to Scotland the conception of reserved waters was fostered and at the same time retarded in its growth by national circumstances. The theme of reserved waters thrived upon economic necessity and desire for monopoly but could acquire no substantial quality for want of naval force. As a domestic matter it formed a stumbling block to the consummation of the union of Scotland and England in 1604 and the fishery projects of Charles I. Its greatest influence in international affairs was exerted when James I introduced the Scottish conception into the English policy to give impetus and direction to the negotiations with the Dutch on the subject of the licences for the fishing in the English coastal waters. The Scots had been aggressively jealous of the Dutch and resented any intrusion into the Scottish preserves; the English perceived that the herring fishing supplied the power and the wealth upon which the nascent State of Holland was ascending to a leading place as a maritime power to compete with England. To curb that Dutch competition was the essential object of Mare Clausum, to maintain it the leading purpose of Mare Liberum. Consequently, the Scottish claim to the reserved waters obtained an eminence not due to its own inherent value; international importance was thrust upon it.

III./

III. For the moment we would discuss the birth and growth of this Scottish prodigy. The origin of the rights of fishing in territorial waters of the Teutonic States has already been the subject of research. As the Scottish interests may well have drawn some inspiration from the early practices of these States the conclusions reached may be briefly stated.

"There is ~~much~~ evidence," a writer says, "which points to, if it does not prove, the existence of property rights in bays and smaller indentations along the coasts; the gulfs and great bays may also have been reduced to private property, with perhaps, appropriate restrictions to guarantee their accessibility to the public.... The possession <sup>private</sup> of fisheries in the sea; the grant of privileges and immunities [in connection with] the land and the cities on it which also had come into the lord's possession by virtue of a royal or imperial grant; the right to levy customs and taxes on foreigners - all of these rights and powers together would naturally produce in the mind of the ruler possessing them a sense of the proprietorship of the things over which he exercised them... The theory of the extension of territorial jurisdiction over the sea adjacent to the coasts was yet (1245) to be formulated. Maritime jurisdiction of this character and origin was exercised long before it received recognition from the great jurists." (1)

IV. There is indeed evidence of similar rights being recognised in the Law of Scotland as applied in Orkney and Shetland. These islands were not finally severed from Norway and attached to the Scottish Crown until 1471 <sup>(2)</sup> and even after that date the islanders retained the Scandinavian customs. <sup>(3)</sup> As each European State adopted only such modified feudal customs and conceptions as best suited its own circumstances, it does not necessarily follow that in Scotland generally there was a recognised practice of granting vassals exclusive rights to the fishing on the firths. The Regalia, in so far as they relate to the shore, ports, and royal fishes were embodied in the municipal law of Scotland but they have no bearing on/

(1a) Fenn 57. (2) Scots Statutes 1471 ii 102(b).

(3) The odal or udal tenure of land was formerly prevalent in Orkney/

no bearing on the subject of this essay. Apart from the instances in Orkney, Shetland and the Western Isles, localities where the Norse influence survived, there is no clearly evidenced instance of property rights being granted in the herring or other fisheries.

V. Feudal conceptions were operating in the reign of David I. The two solitary instances of feudal grants given below have been advanced to show that at that date the sovereign claimed the fisheries in the firths. The Firth of Forth had from early times been frequented by native and foreign fishermen; the Firth of Clyde likewise was a lucrative fishing ground. These two instances were grants of fishing at these parts and both were to the Church. The first is contained in a charter dated 1138 to the monks of Holyrood Abbey and purports to confer, inter alia, the right of fishing for herring at Renfrew. Apart from the difficulty of construction of (5) the passage it is omitted from the confirmation. If there was any fishing near Renfrew, there would be no point in conferring a right enjoyed by all. On the other hand, it may have been a tithe of the fish landed, not <sup>an</sup> unusual grant to the Church in later times in other parts of the world, that was intended. The second grant was the right to demand dues /

- 
- (3) Contd. Orkney and was recognised in the Law of Scotland. Scots Statutes 1633 c.42. 53 a.b. The assise of herring was never levied in those areas, Exchequer Rolls of Scotland xxiii, vide Herring, Assise of.
- (4) The influence of the early Norwegian laws can be seen to operate in attaching the inshore fisheries as a pertinent to the land. See Larson sub 'fishing grounds' 'sealing' and 'Whale'. and also Appendix 2 (Commission to Lord Bothwell which was abortive).
- (5) Maitland's History 145. The charter as given in Maitland is printed in Scots Stats. See Lawrie Charters 117 & 385 for the confirmation. See also Fulton 59 who omits reference to the Renfrew instance but notes and relies upon the grant in respect of the May Island fisheries. He assumes this to prove the early appropriation/



dues from those fishing, both natives and foreigners, around the Isle of way. That this grant was affirmed on several occasions would indicate that in practice ~~the grant~~ was ineffective. It is suggested that the object of the grant was to give the monks the first claim to fish where many desired or to endow the monastery with a convenient source of revenue, namely a tithe of the herring caught around the island. In return for this payment the fishers would have the good offices of the monks and the facilities conveniently afforded by the island. The grant was not dissimilar to others made to the Church on the Continent but it cannot by itself be taken to prove a general practice in Scotland or as conclusive evidence of the reservation of the fisheries in the firths and inshore waters for the natives ~~as a whole~~ to the exclusion of the foreigners. The exceptional nature of the grant may be observed from another angle. In 1153, it was decreed that all goods brought by sea should be landed prior to sale except herrings and salt which could be sold aboard vessels. The exacting of tithes in such circumstances in respect of fish caught and exported by foreigners might be a matter of some difficulty. Indeed it is not until 1240 that there is any notice in the Parliamentary records of a burgh tax on herrings and not

until/  
appropriation of the coastal fisheries.

Anderson A.O. i. 66 has noted that St Columba claimed exclusive sealing rights probably at Coll. Monasteries frequently established fish preserves.

- (6) Fenn 54 c.9. i. 334  
 (7) Leges Quattuor Burgorum - Scots Stats. c.6. i. 666 amended  
 (8) Assise of David - Scots Stats. c.6. i. 666 c. 26. i. 436

until 1424 was there a general assise of herring levied, the  
 (9)  
 theloneum of the Scandinavian and Baltic countries. Every-  
 thing points to the grant to the monastery as <sup>being</sup> exceptional and,  
 in any case, it would <sup>not</sup> be legimates to deduce from one soli-  
 tary instance any rule of general application to the firths  
 and inshore fisheries of the mainland.

VII. In contradistinction to the lack of evidence as to  
 the ownership or appropriation of the fisheries in the main-  
 land firths, it is indubitable that the Orcadians and the  
 Shetlanders, being of Scandinavian stock and outlook, follow-  
 ing their traditions, regarded the fisheries about their  
 islands as appropriated as appendages to the land. This  
 attitude is reflected in their charters. A commission appoint-  
 ing a sheriff in Orkney and Shetland speaks of all and sundry

"oure soverane lordis iles, partis, boundis, and fisch-  
 ings, landis and lordschippes baith by sey and land".(10)

The feudal rights in the sea are indicated in two charters  
 at least; fishing rights in fresh and salt waters are confirm-  
 (11)  
 ed in one John Irving(1536), and in the other the Fife fish-  
 ing burghs agreed to pay the dues for fishing and other  
 privileges/

(9) Scots Statutes 1424. c. 22. i.6.

(10) Reg. Privy Seal. xiv. 83

(11) Orkney. 221. As to the precise meaning which came to  
 be attached to the feudal grant of fishing in fresh and  
 salt water, see Stair ii. 3.69. The remarks of Stair  
 are authoritative as to a later date and show that a  
 change in thought had occurred in the interval. They  
 are clearly against the reservation <sup>being and</sup> of the white fishing.  
 As to this point refer to page 147 for a discussion as  
 to the powers to appropriate sea fishings by grant.

privileges. In the latter instance the details of the charges  
 (12)  
 give the deed a ring of sincerity. Also, foreigners had to submit  
 to heavier dues than those exacted from the natives, for, on  
 appeal to the Privy Council, it was held that the right to levy  
 dues from foreigners was a prescriptive right exercised by other  
 (13)  
 princes.

VIII. Such limited grants could not substantiate the wider claim  
 of the burghs to the reservation of the fisheries around the  
 coasts. In that connection there is conflict between what became  
 the orthodox theory and the facts. The theory was essentially  
 burghal, the facts almost, but not entirely, universally against  
 the claim. The Estates might call upon the burghs to build busses  
 to compete with the foreigners and the burghs might on occasion  
 attempt to drive the foreigner from the fishing grounds but there  
 was apparently nothing definite in the municipal law or in the  
 records of the Council to prohibit the foreigner from the coastal  
 fisheries. It was an economic matter in which the burghs were  
 primarily interested; political objects and considerations were  
 secondary.

VIII

IX. The fifteenth century saw the initiation of a period of  
 activity against the foreigner and towards fostering the fishing  
 industry. The Scots were aggressive and had <sup>obtained</sup> ~~fallen into~~ such  
 repute as pirates that the Hanse towns threatened to withdraw their  
 trade. The Scot so harassed the <sup>foreign</sup> fishermen that William, Earl of  
 Holland/

(12) Appendix <sup>3</sup> A.

(13) P.C.R.S. x. 248.



Holland authorised reprisals for damage done to the fishing fleets. Six years later a treaty was signed but the disputes as to the reservation of the fisheries remained unsettled. The anxiety of the King for the industry and his profit is shown by a number of Acts. In 1424 the first assise of herring was laid. Acts were passed for the building of fishing boats or busses in 1471 and 1493 but apparently to no purpose. A hundred years later, in 1605, it was the same tale; the burghs although urged by the King showed no inclination to build ships for the deep sea fishing. In 1487 two very interesting Acts were passed the effect of which was that the ordinances of the Privy Council as to the fishing at the Lewis and the West be observed and that the King was to grant no "letters" in time to come. The letters have been taken as applying to the fishing and to have been licences to foreigners to fish at these places. But one Act refers to 'merchandice' also and the implication of licences to fish is unnecessary. The first Act was at the instance of the burghs and the second follows closely upon a series of enactments dealing with national economy, e.g., coinage, import- and exportation of bullion/in which the term 'merchandice' is synonymous with trading. The burghs, jealous of their privileges and anxious for their revenues, were against exemptions from the requirements that fish should be landed at the fishing burghs. The second Act from the context was prompted by the desire to conserve the national supply of food in a time of scarcity and only this wider interest can explain a duplication of provisions. The theory that/

(14) See para. XI as to the treaties of 1541 and 1550.

(15) Scots Stats. 1471 c.10. ii. 100; 1493 c.20. ii. 235; 1605 c.14. ii. 242.

(16) do. 1487. c.15. ii. 183(a) ; 1487. c.18.

(17) Fulton 83 & 242; C.R.B. ii. 300 & 313.



that the letters were grants of tithes would also appear inadequate for the burghs later were prepared to negotiate formal agreements with the Bishop of the Isles and with the local proprietor as to these and ground leave. (18) The correct view would appear to be that the King had granted exemptions from the duty to bring the fish to free ports and traders were anxious to obtain these licences because the foreign trade was more lucrative and the licences, to the King, formed a direct source of income. The practice of the Crown to grant exemption from such restrictions upon trade was not unusual as would appear from the protests and the pronouncements of the Privy Council that Acts be observed. It is to be remembered that the Scots Acts could fall into desuetude and that required no repealing enactment and the King was but lightly tied as to his grants in derogation of Acts.

IX. The interstate political factor is introduced about 1532, when, in pursuance of their alliance with the French, the Scots, under Robert Fogo of Leith, cruising along the coasts of the Low Countries, damaged the Dutch fishing fleets. Reprisals followed and the exasperated King James V threatened to stop the whole of the Dutch fleet fishing off the coasts of the Kingdom. Owing, however, to domestic troubles and difficulties with Henry VIII of England, the minatory declaration was not effected and the treaty with the Dutch concluded in 1541 left the issue of the fisheries as it had been - unsettled. The sorry business of molestation and reprisals was re-enacted and another treaty signed in 1550. (19)

X./

(18) C.R.B. ii. 300, 308, 313, 343, 374, 411.

(19) Scots Statutes. C. 12. 11. 209. Appendix 6.

XX. As these treaties of 1541, 1550 and the later treaty of 1594 were to be repeatedly referred to and debated in the negotiations with the Dutch after 1609, their precise terms may be noticed. As to the treaty of 1541, the Scottish Commissioner's instructions appear to have contained an item relating to the fishing but its tenor is unknown. The Queen of Hungary, Regent of the Netherlands, required that she be allowed six months in which to give an answer. Whether an answer was ever given <sup>also</sup> is unknown. Probably the instructions had for their purpose the exclusion of the Dutch from the Scottish 'land' fishing. If so, the Dutch would have <sup>had</sup> considerable difficulty in assenting to any proposal tending to curtail the activity of their national industry. The only certainty is <sup>not</sup> that a proposal ~~altogether~~ <sup>not</sup> acceptable to the Dutch was made by the Scots. However, the subject could not have been of prime importance for the treaty was signed without agreement on the point. The treaty of 1550 provided that, in the interests of fishing and navigation, the parties should be responsible for the suppression of piracy within their respective jurisdictions and on their coasts and that the provisions of the treaty of 1541 as to the fisheries should be truly and sincerely observed. The Dutch claimed and the Scots denied that these treaties secured for the Dutch the right of fishing off the Scottish coasts. Where the truth lay is difficult to determine. The Scottish burghs buttressed their claims to the reservation of the fisheries by a declaration not consistent with fact, that foreigners had never fished in the Scottish coastal waters; they went further by asserting that the Dutch had agreed to keep more than eighty miles from/

(20a) from the coasts. The treaty of 1594 in its final form was merely a confirmation of the previous treaties<sup>(21)</sup> and yet the Dutch prized it more than the others as entitling them to fish off the Scottish coasts. The Scottish records could not furnish a copy of the treaty when it was afterwards urgently required and there is no notice that the Dutch ever tabled a copy during the negotiations.

(22) According to instructions (probably a draft) to the Scottish representatives in 1594 the Scottish Crown claimed rights in the northern fisheries but admitted that foreigners did in fact enjoy at least the privilege of fishing there. It appears that the parties placed different constructions upon the fact that the Dutch fished alongside the natives in the coastal waters; the Dutch held it to be evidence of a treaty concession confirmed by long standing use; the Scots regarded it as an invasion, tolerated at best, of their rights and not a concession like that said to have been granted to

(23) the French. Economic need fostered the Scottish claim to the reservation of the fisheries; the economic needs of the Dutch dictated the rejection of the claim and, in the contest, the Dutch, being the stronger, prevailed. At its highest value then (24) the Scottish claim was merely an article of barter in diplomacy.

XI. The root basis of the Scottish burghal claim was economic. A change was coming upon Scotland, the first effects of which were now being felt. The western states of Europe, especially Spain, England, and what was to become the State of Holland were in the preliminary/

(20a) Welwod - Sea Lawes. (21) Foedera iv. 21 & 22.

(22) Warrender Papers Appendix 7. Vol. i. 351. (23) See note (22) Craig-De Unione fol. 243; Bruce Appendix XV. lxxxiii.

(24) See note (23)

preliminary throes of political and economic difficulties. The chain of consequences was not to work itself out until England and Holland had contended for the leading place in the list of maritime nations and it had been decided that England should have the premier place as the carrier of the world's trade. In the near future, the Dutch, by frugality, efficiency, and improved methods in the curing and skill in the marketing the fish, were to rise to power; the Dutch 'gold mine' was the fishing (25) along the coasts of Britain. The Baltic fisheries had declined and along with them the towns which had depended upon them. In their place the Dutch towns had arisen. The wealth of Spain drawn from the New World was not to save her from being crippled by the loss of the Spanish Netherlands and from the loss of prestige by the defeat of the Armada. The wealth of the New World was to foster a world change from an economy suited to an agricultural community to a 'money economy'. Inevitably the gold of Spain could not be contained within the national bounds and the overflow was shared by the other nations. The colonisation of the New World, the expeditions of the Elizabethan seamen, the opening of trade with the Far East, despite Papal reservations in favour of Spain and Portugal, were but symptoms that the countries of the Old World were seeking greater scope for their activities and room for expansion. There were difficulties and growing pains. Old habits and traditions died hard. The King could not "live on his own", or at least the accustomed revenue. Elizabeth, by a parsimonious/



parsimonious economy, survived the storm; the adverse economic forces were too much for the Stuarts. Scotland, on the fringe of Europe, was not altogether immune. In 1593, an Act, Jac.VI, c.32 was passed for the 'Annexatioun of the Propertie of the Croun that was nocht annext befoir' for remedy of the impoverished revenues of the Crown. As elsewhere there was in Scotland the difficulties of adjustment. There was both unwillingness and inability to change. Against the new and not understood economic forces the old armour of Acts and methods suited to the thought and circumstances of days gone by were vainly tried. Acts to prevent the export of goods, licences granted, withdrawn, granted afresh, price fixing, proclamations commending emigration, follow in feverish succession indicating the anxiety (26) felt.

XII. The measures dealing with the fishing, which need only be considered here, will be more easily understood when it is noted that there were three parties concerned, the Crown, the burghs, and the foreigner, that the dearth was being more and more felt, that the Treasury and the burghs benefited from the assise of herring landed at the east coast ports only, that the foreign market for herring was more profitable than the home, and finally, that one of the best fisheries was at Loch Broom on the west coast - a combination of circumstances sufficient to compel action.

XIII. In 1488 and 1491 the sale of fish to foreigners was forbidden /

(26) Appendix N5

(27) Prevention of the export of goods. P.C.R.S. IV. 74, 104, 116, 123, 159, 181, 218, 305, 412, 589.

(28)

forbidden and in 1566 Loch Broom was closed to aliens. In that year foreigners had most earnestly petitioned the Queen for licences to fish in the Loch. It has been surmised that the licences now sought were the 'letters' prohibited in the previous

(29)

Act. On the present occasion the licences were refused after consultation with the burghs and the Council ordained that-

"no stranger of whatever nation they be come to the lochs nor use the commodity of the fishing in time to come, but that the same be reserved for the born subjects of this realm."

Loch Broom may thus be the first authoritatively closed loch

(30)

fishing. Timeo Danaos et dona ferentes. Doubtless, in view of the practice elsewhere, any Scottish claim to the reservation of the fishing in the smaller, well defined bays should not be lightly questioned but Loch Broom was scarcely within the pale; it was an oasis of civilisation in the north west where the King's

(31)

writ ran but fitfully. On the same day as Loch Broom was closed to the foreigner, the Council, alarmed at the reports of piracies by the Scots under colour of the authority to search ships, revoked all letters of search, especially those in Orkney, Shetland and

(32)

Caithness. It was therefore for the sake of peace in the inaccessible Loch Broom as well as the reservation of the fishery for the burghal monopolists that the foreigner was excluded by edict. Significant as the enactment was, it was but one

item/

(27) contd. Licences and price fixing - P.C.R.S. II. 264, 406, 424, 427, C.R.R. I. 555. Emigration - P.C.R.S. II 148.

(28) Mitchell. 143 & 151. (29) See page 41 ante.

(30) P.C.R.S. i. 482. (31) P.C.R.S. iv. 121-3. Attempts to settle Lewis were made in 1599, 1605 and 1609.

(32) P.C.R.S. i. 481.

item in panic legislation and, as subsequent events proved, unenforceable by the Crown. Indeed, in the northern Hebridean fisheries the local chieftian levied toll from the fishers of all nations. (33) The foreign market's magnetic attraction in higher prices for the acquisitive Scot caused the home market to be neglected. In 1573 it was ordained that all fishers of herring and white fish within the firths and the isles and upon the coast bring their catch to the free burghs (on the east coast) there to be sold so that the King's customs be not defrauded nor the population (34) (35) deprived of the fruit of the sea. A re-enactment followed in 1579 (36) and still another in 1584. This last must have been more effective for the burghs complained against the provisions and the obvious (37) inconvenience. The Privy Council found against them. This Act did not expressly apply to foreigners and the omission was remedied in (38) 1600. In the negotiations after 1609 the Dutch successfully maintained that they had never paid any tax or suffered any restriction; in its application to foreigners the Act had been a dead letter.

The Act of 1600 also required licences to be obtained for the export of herring. Other expedients (1586) were to require the natives to take out licences for the Loch Broom fishing and/

---

(33) See page 75. (34) Scots Statutes 1573. c.7. ii 83.

(35) Scots Statutes 1579 c.24. iii 146.

(36) do. 1584 c.19. iii 302 partially repealed by c.11. iii 378.

(37) P.C.R.S. iv. 17. (38) Scots Statutes 1600 c.19. iii 230.

and to require caution that the ship would bring a proportion of the catch to the free burghs and against the fitting out of the vessel for distant voyages. All these shifts and reiteration of enactments prove the desperate inability of the Crown to control the situation. To exclude the foreigner from the Loch Broom fishery was only a part of the remedy. If effective it was only by the acts of the natives themselves. As it was, however, the burghs were themselves unable to keep interlopers from their preserves and when they attempted to enforce the reservation nearer home they received no support from the Council as the next <sup>two</sup> paragraph<sup>s</sup> show.

**XIV** Reservation of the fisheries was included in the burghal scheme of privileges to be maintained not only against the ~~alien~~ alien but also against the unfreemen at home. All unfreemen and slayers of herring and white fish were to be inhibited from sailing with them outwith the realm and not disposing them to free merchants, that is the burghesses, 'as use hes bene'. Again the burghs complained of the hurt sustained by reason of the multitude of unfree sailors and required the enforcement of the statutes against all except freemen of the burghs. The tribulations of the burghs continued and in 1591 it was 'statute and ordained' that all merchants resorting to France and Flanders or any part of the 'Ester Seyes' should at no time depart from any burgh or seaport of the realm without special tickets of/

(39) *Scots Statutes* JAC. II. c. 57.

(40) *C.R.E.* i. 21. Such claims as to rights based on custom are not to be accepted without qualification.

(41) *do.* i. 19. (42) *do.* i. 356. i. 12.



of their freedom to be exhibited at the port of call, reenactment of a provision of 1552. (42) There was constant warfare between the unprivileged class and the privileged few and we probably do not err in saying that the same state of prolonged belligerency prevailed between the burghs and the alien fishermen.

XV. The pleas in defence in the case of two English vessels seized when returning home with their catch by Thomas Davidson of Crail on the allegation that they had been fishing within Scottish waters recited -

"Albeit it be of veritie that thair fischeis within the saidis schippes wer gottin upon the mayne sey, outwith his Majesteis watteris and dominionis, quhair not onlie thay, bot the subjectis of all utheris princeis hes had ane continuall trade and fischeing in all tyme bigane past memoire of man. And gevand the saidis fisches had bene gottin in his Majesteis watteris, yit, in respect of the continual trade quhilk all strangearis hes had thair in all tyme bigane, thair being na inhibition maid nor publissit to the contrair as yit, na sic preparati<sup>o</sup>ve nor novaltie aucht to have bene usit on thame." (43)

Restoration of the boats within twentyfour hours was ordered. Fishing in the Scottish waters had not been officially prohibited. It is extremely/unfortunate that the grounds of the decision were not recorded but the significant last plea is not contradicted by any known facts.

XVI. Failure to prove conclusively the reservation of the fisheries does not, however, negative the Scottish claim to maritime sovereignty. (44)

The subtle questions as to what was comprised/ in (42) "C.R.B. i. 358. i. 12." (43) "P.C.R.S. IV. 216. Fulton 85" appears to have been misled as to the decision. He assumes that no decision was reached.

(44) Twiss 175 as to the reservation of fisheries in England.

comprised within that sovereignty had not been raised. The extent of waters claimed and the exclusive jurisdiction exercised was a matter, in the first place, for the prince controlled<sup>ed</sup> by the circumstances of his State, and, in the second, for those States which were affected and had the power to object. Nevertheless there was this much in common, all the princes regarded it their duty to afford protection within the stretch of waters along their coasts. Whereas the limit of fifty miles in Bothwell's Charter of Confirmation as Admiral<sup>(45)</sup> was probably extravagant in keeping with the general tenor of the deed, the limited jurisdiction claimed by Philip in 1563, the 'land kenning', was probably sufficient for Scottish purposes also. This jurisdiction carried the obligation to prevent the hovering of pirates outside the ports and roadsteads. How this duty was performed by Scottish ships operating under royal warrant is illustrated by two extracts from contemporary reports. In the first extract there is the evidence of the limitation of jurisdiction; in the second, the b<sup>y</sup>ghs show they had little to learn as to the manner in which they should carry out their duty.

A."Item. Inlykemaner that it be proponit to my Loird Regentis Grace and Loirdis foirsaidis, incais the Queenis Maiestie of Ingland will grant and consent that sum of hir schippis sall remane upon hir sea coistis and watteris for purging of the same of pyratiss and utheris wicked personis. That inlykewayis it may be granted be his Grace and the Loirdis foirsaidis to the merchantis of this realme, upon thair commoun chargis, to set furth ane schip with ane bark for purging of oure Soveranis watteris of the saidis pyratiss and wicked personis, and for convoying the schippis of this realme langis the coist of/



of Ingland, and utheris pairtis neidfull, from the danger of innemeis, during sic tyme as we fynd gude, that thay may imput and output at thair plesouris, be the avyse and command of the saidis foure burrowis. And gif it beis found that be the Queene of Inglandis schippis the seas in thir pairtis beis clengit, than the schip and bark foirsaid upon the sute of the nychtbouris (of) the burrowis of the north and west pairtis, to pas for clenging of thair seais and watteris, and sua be Ordour be rady to serve quhair neid salbe grettest, be the avyce of the saidis foure burrowis."

(Records of the Convention of Burghs. 25th July, 1574).

B. "At my first coming to Anstruther there fell out a heavy accident, whilk vexit my mind mickle at first, but drew me mickle nearer my God, and teached me what was to have care of a flock. Ane of our crears, returning from England, was beset by an English pirate, pill(ag)ed, and a very guid honest man of Anstruther slain therein. The whilk loon coming pertly to the very road of Pittenweem, spulyied ane ship lying therein, and misused the men thereof. This wrang could not be suffered by our men, lest they should be made a common prey to sic limmers. Therefore, purchasing a commission, they riggit out a proper flyboat and every man encouraging another, made almaist the hail honest and best men in all the town to go in her to sea.

x       x       x       x       x       x       x

The captain, for the time being, a godly, wise and stout man, recounted to me truly thair hail proceeding. That meeting with their admiral, a great ship of St Andrews, weal riggit out by the burghs, being in fine of sail, went before her all the way, and made every ship they foregathered with, of whatsoever nation, to strike and do homage to the King of Scotland, shawing them for what cause they were riggit forth and enquiring of knaves and pirates. At last they met with a proud stiff Englishman, wha refuses to do reverence; therefore the captain thinking it was a loon, commands to give them his nose-piece, the whilk delashit (discharged) lights on the tie of the Englishman's mainsail, down it comes; then he yields, being but a merchant."

(Chambers. Domestic Annals of Scotland l. 176-7.)

XVII. On this triumphant note we would close this review of the Scottish claims at the convenient date of the Union of the Crowns. There has been disclosed a Scottish jurisdiction in the coastal waters recognised in a treaty with one of the leading maritime powers and we have the burghs asserting force

under /

under the aegis of the Crown to establish that jurisdiction in a manner which proves the common knowledge of the continental practices and possibly the Ordinance of Philip, the Leges Nauticae, dated 1563 requiring that shipping be not molested within sight of his shores. There is no evidence whatever that coastal navigation had been prohibited after the fashion of the Baltic States. Indeed the Scottish claims were not on the continental plane: Bothwell's Charter aspired to that level but was reduced at the instance of the burghs. Equally vague were the claims to the reservation of the fisheries in the coastal waters and gulfs. On the east coast where the power of the State ought to have been most potent the foreigner was theoretically subject to the restriction on the disposal of his catch but in practice he was as free to deal with that as if it had been obtained in mid ocean. In the north and the west there were other considerations and, apart from the solitary instance of the Loch Broom closure, there is no known instance of the foreigner being excluded from the coastal fisheries. There is evidence, however, that the burghs firmly believed the foreigner to be excluded. There was a conflict of interest, reservation of fisheries for the Scots and ~~unrestricted~~ unrestricted freedom for the Dutch. The treaties between the States avoided the issue and false tradition tainted popular beliefs. Immediately the next period opens this reservation of the fisheries was to wreck King James's scheme for the union of the Crowns and to reappear in an altered English foreign policy.

---

(46) Bynkershoek, Questionum 1. 8. p.59.

(47) See page 43 (48) See page 71 .



## Chapter IV

## THE EARLY HISTORY OF THE ENGLISH CLAIMS.

It may be premised that the English claims, no less than the Scottish and others, were the outcome of circumstances, including the past, fashioned by factors in the national life and developing and changing in accordance with the varying situations arising in the passage of time.

I Generally the Scottish and English claims were not dissimilar; both admitted navigation of the coastal waters by the foreigner without restriction or impediment of dues; neither, as a rule, required licences to be obtained for the liberty of fishing<sup>(1)</sup> - all certain and the most notorious features of maritime dominion in the Middle Ages. The English and Scottish claims were thus distinct from the Venetian and Scandinavian which sought an extensive and absolute sovereignty in respect of the sea, a sovereignty no narrower in its application or embracing less than sovereignty over landed territory. The similarity between the Scottish and English claims was threatened towards the end of the period by attempts of the Scots to close the fishing in the coastal waters against the foreigner; the English policy continued to pursue the primary object of protection and security with unrestricted freedom to the foreigner for trade and fishing. Undoubtedly, changing circumstances in England were to produce a situation favourable to the introduction by James I of the Scottish notion of reserved/

(1) The exceptions which, so to speak, went to prove the rule were the closure of Loch Broom in Scotland and the granting of licences by Elizabeth and James in continuation of/

reserved waters into the English policy. The diverging tendency was due to different attitudes, the keys to the understanding of which are furnished by the appeals to national sentiment; in Scotland the complaint of the burghs was that the foreigner was taking toll of the wealth at the nation's very door, and 'the meit out of thair mouths': in England the threat of danger to the sovereignty of the sea was a call to action. (2) It was immaterial that the 'sovereignty of the sea' was sufficiently elastic to meet the varying needs of centuries implying, as suited the occasion, the predominant sea power to secure the safety of the coasts or the dominion upon the undefined "British Seas" so dear to the national pride.

II The theme of the ~~story of the~~ English claims was 'the seas must be kept'. The possession of territory of greater or lesser extent upon the Continent from the Norman Conquest to the loss of Calais in 1558 called forth, from the twelfth century, large scale military expeditions which, to be successful, demanded the unimpaired freedom of passage across the Strait of Dover and the English Channel. Sea power was essential, and therefore the English claims to maritime dominion may be expected, as in the instance of Venice, to appear in the guise of naval supremacy or to arise out of it. To have this command of the sea is the intent of the phrases 'to guard the seas', 'to guard the seas and the sea coasts' found in the old Admiralty records. (3) The evidence indicates that they probably/

---

of a former practice for the fishing at the Zowe Bank in the Channel. Fulton 65." (2) Fulton 2. (3) Fulton 31

probably implied no claim to exclusive jurisdiction or sovereignty at any time until Selden wrote against Grotius. It was for the purpose of providing the naval service that the Cinque Ports were favoured and developed. It was to the same end that the admiral was appointed in or before 1297, viz., to keep the  
 (4)  
 peace of the seas. When these failed or proved insufficient  
 (5)  
 the duty was contracted out.

Military expeditions apart, there was the ordinary mercantile traffic to be protected, not only in the Straits but elsewhere along the coasts. The seas were in a very lawless state.

"There was", says Nicolas, "for two or three centuries after the Conquest a formidable naval force, which was independent of both governments (of England and France), and which when not hired as auxiliaries by one of the belligerents in time of war, acted as their own interests dictated acknowledging no authority but the chief whom they elected, and, unrestrained by no national or moral law, they inspired terror (6) wherever they came and obtained the general name of pirates".

The Kingdom being divided by the Narrow Seas, for military purposes, in the interest of expanding trade and for the safety of the fisheries, it became more necessary that the menace of piracy should be stemmed. If it had been possible for the Scandinavian States and Venice to claim dominion upon the sea on the ground that they ensured and maintained peace ~~upon the~~  
~~==~~ then there was no reason why England should not have aspired to similar dominion. The advocates of Mare Clausum would have it that the sovereignty was, in fact, exercised. So far  
 as/

^(4) Marsden i. intro. x., 46 & 50. (5) Marsden i. 385. "

(6) do. i. intro. ✓



as the evidence goes no such claims were asserted until a century afterwards. The jurisdiction upon the seas was not exclusive. The success of the operations were judged from the military point of view alone. If the King of England was, in fact, Lord of the Seas, <sup>(7)</sup> it was in a military sense and not on the ground that the sea was within His Majesty's dominions.

III The exercise of a dominant sea power required caution. Any move towards the appropriation of the seas involving impediment to the other nations would have incurred their displeasure and combined their forces against the party appropriating. In theory the English King would have had some 'legal' authority in claiming the Narrow Seas; and the Commons in 1420 were not in two minds on the matter. The jurists of the fourteenth century, whose authority was very considerable in the Mediterranean countries, and, at a later date, in the western states, had adopted a rule of the Civil Law, that applicable to rivers, to give the property in the seas to the sovereign possessing both shores. Founding upon this rule the Commons proposed that Henry V, being in possession of both shores of the Straits of Dover, should levy such taxes as he thought reasonable upon the shipping to maintain the naval guard. The King declined to adopt the suggestion. <sup>(8)</sup> The jurisdiction of England upon the Narrow Seas was shared from time to time, war and the weakness of the navy requiring, with other States.

IV. /

---

(7) Fulton 36 <sup>v</sup> (8) Rot. Parl. iv. 126 <sup>v</sup>



IV The English jurisdiction, proper and exclusive, began to appear faintly about the beginning of the fourteenth century. At first uncertain it <sup>grew,</sup> ~~became~~ bolder until in the reign of Elizabeth it was not afraid to declare itself to its strongest opponents, Spain and Denmark. The declarations of Elizabeth show that the English conception was dominion over a narrow belt of water burdened, in the interests of trade and commerce, by restrictions in favour of the non-national. It was a type of jurisdiction such as that claimed by Scotland, by France and (9) by Philip in his Nauticae Leges to the Flemings in 1563. There were thus three groups of States, the north and south groups, i.e., the Scandinavian and the Mediterranean, in favour of an extensive and exclusive maritime dominion and the middle group, the States around the North Sea, claiming only a moderate right and respecting the interests of others, to all appearances the prototype of the modern doctrine of territorial waters.

V About 1303 in a draft of a submission of complaints to a tribunal to be composed of English and French Commissioners it was premised that England possessed an exclusive maritime jurisdiction and that the French admiral had encroached thereon (10) contrary to treaty. As, however, the document is only a draft it would be unwise to found too much upon it. The claim to an exclusive jurisdiction may not have been admitted by the French but, in any case, all the acts complained of, with one exception/

(9) Bynkershoek Questionum 59. (10) Boroughs 57 et seq.  
Fulton 43 et seq.

exception took place within the areas which later came to be defined as the King's Chambers where the King of England was not denied an exclusive jurisdiction. The point of the plaint was that the King's jurisdiction had been breached by the acts. Nothing further is known of the matter. Selden surmised that the issue was too important to be settled by a tribunal and that it was taken out of their hands. An equally probable surmise is that the matter was settled in the ordinary way by remonstrance. In such circumstances speculation may be directed into any channel. There is certainly no conclusive evidence in the draft of a maritime jurisdiction extending far out to sea such as was afterwards claimed. In 1521, Wolsey, when acting as intermediary between Charles V and Francis of France, stipulated in the treaty that there should be no hostilities in harbours, rivers, bays and roadsteads, especially in the Downs or any locality under the jurisdiction of England: "Aut alia loca maritima quaecunque jurisdictioni ~~dicti~~ Regis Angliae subjecta".<sup>(11)</sup> The restriction to harbours and their immediate vicinity, i.e., where vessels sought safety, appears to have been no extraordinary claim; the hostilities were not hindered on the open seas.

VI. The officer charged with the exercise of this jurisdiction would be the admiral or his deputies. Edward III referred the question of regulating and strengthening the jurisdiction of the Office of Admiral to the judges for consideration/

---

(11) Foedera xiii. 753.

consideration. The terms of reference leave no doubt as to the extent and nature of the jurisdiction, namely, the administration of the mercantile marine laws affecting such issues as arose between master and mariner and shipper. He had also a penal jurisdiction, the duty of preserving peace and maintaining security for shipping upon the seas - all duties exercised (12) by the admirals of other States.

VII Considerably later, in 1554, the Privy Council issued instructions to William Tyrrell, Vice Admiral, which indicated duties appertaining <sup>in</sup> to the office and the keeping of the seas at that time. He was to repair to the Narrow Seas there to keep the passage diligently and to do what he could for the defence of the passengers from Dover to Calais. He was also to defend the rest of the Queen's ships from all violence and wrongs, if such were offered, himself offering no wrong to any nation so long as Her Grace continued in amity and peace with all princes. From other instructions issued about this time it would seem that a considerable part of the admiral's duty was the wafting or convoy of ships according to the instructions of the Privy Council, and, on occasion, the admiral was required to proceed (13) down the Channel to clear the pirates from the coasts. There is nothing to suggest that even in the Narrow Seas in Mary's reign her jurisdiction was supreme and exclusive.

#### VIII /

(12) Fulton 51 - 54. See Appendix 'R' - Scottish Admiral's charter and passim Acta Curiae Admirallatus Scotiae

(13) P.C.R.E 20th May, 1554, See also 1576, pp.178, 193 & 201



VIII Precisely when and how the English jurisdiction came to be restricted cannot be definitely ascertained. Before 1603 the King's Chambers would appear to have been regarded as settled, perhaps indefinitely, by tradition. The incident of 1303 determined nothing,<sup>(14)</sup> for the Commons' solicitation in 1420 showed quite clearly that they intended dominion upon the Narrow Sea. If a definite date must be assigned, it may be suggested that the declination of Henry V at that time to possess himself of that dominion over the Straits rendered it very difficult, if not impossible, for his successors to resuscitate the claim. As it was, the general policy of his predecessors in <sup>favouring</sup> freedom for trade and fishing left him little room for election; the possible consequences of adopting the Commons' proposal gave him no option but to decline.

IX The confinement to the coastal waters of the operations against pirates noted in the Scottish Privy Council instruction in 1550 does not appear to have had a corresponding restriction in the English commissions.<sup>(15)</sup> Sometimes convoys were despatched with the fishing fleets as far as Iceland and Westmonie. These may have been exceptions as there is notice in the Statutes that the right of the Sovereign to the 'composition', probably tithe, fish from these northern waters was reserved when all other <sup>(16)</sup> burdens were removed. In all probability, convoys were granted when naval strength permitted, to shipping approaching or leaving <sup>ing/</sup>

(14) See p. 58. (15) Marsden i. 146. (16) 5 Eliz. c.5..



leaving the coast. In any case it was clear that in 1562 the harbours and their vicinity were in Elizabeth's opinion within the Sovereign's territory and dominion; her representations to the King of Denmark as to his right of property in the seas between Scandinavia and Iceland left no doubt that the English view was favourable only to a small stretch of coastal waters being included within the State's jurisdiction. In that year Elizabeth informed Mary, Queen of Scots,<sup>(17)</sup> that some Englishmen had been despoiled when lying in a harbour at Westmonie "within the territory of our good brother, the King of Denmark". The law conceived as applicable is given in the letter:

"The taking of the shippes within the harborough, domynion, and territory of the King of Denmarke cannot be justified in lawe, albeit the warres continued then (1558) betweene us and Scotlande. For the territory of an indifferent and mean prince is sauf conducte in lawe".

Elizabeth furnished other examples of the firming of the attitude of England and the dawning of international law as distinct from and on a higher plane than the 'practice of princes'.<sup>(18)</sup> Reference may be made to Elizabeth's famous reply to the Spanish ambassador's request for the restitution of some of the spoils obtained by Drake on the Spanish Main.

"That the Spaniards by their harsh dealing against the English, whom they had prohibited commerce contrary to the Law of Nations had drawn these mischiefs upon themselves.... Moreover she understood not why her and other princes' subjects should be barred from the Indies, which she could not persuade herself the Spaniards had any rightful title to by the Bishop of Rome's donation.... So this donation of that which is another's which in right is nothing worth, and this imaginary property cannot let, but that other princes may trade in those countries and without/

---

(17) Marsden i. 172. (18) Marsden i. 180 & 182.

without breach of the Laws of Nations, transport colonies thither, where the Spaniard inhabit not, for as much as prescription without possession is little worth, and may also freely navigate that vast ocean, seeing that the use of the sea and air is common to all neither can any title to the ocean belong to any people or private man; for as much as neither nature nor regard of the public use permitteth any possession thereof". (19)

X The reference to the Law of Nations is interesting but so far from <sup>being</sup> the rule of general application or widely recognised even Elizabeth must either had doubts or judged it inconvenient to hold to the principle for some of the money was repaid to the Spaniards. (20) There was a Mare Clausum in the north where Elizabeth was to make the same stand and in the end to concede the point as graciously as possible. The general course of treaties and negotiations involving the recognition by England of the practice of the Danish Kings and others in the north of Europe in the regulation and restriction of the fishing and navigation in those parts has been summarised by (21) Fulton but the negotiations in 1599 arising out of the dispersal and destruction of the English fishing fleet at Iceland are particularly interesting and informative. The instructions to the ambassadors in 1602 are an admirable exposition of the principles upon which the freedom of the seas stood. Unfortunately Elizabeth had to counter the precedents created by her predecessors. The English envoys were to advance that the Law of Nations allowed fishing in the sea everywhere and the use/

(19) Camden 225; (20) Camden 225. (21) Fulton 110.

use of the ports and coasts of all princes in amity, which rights could be lost only by agreement or contract. If the Queen's predecessors had yielded in taking out licences for fishing it was more than was due by the Law of Nations. As for the property in the sea, in some small distance from the coast, it might have yielded some oversight and jurisdiction, yet princes did not usually forbid passage or fishing as was seen in the Queen's seas of England and Ireland, and in the Adriatic Sea of the Venetians; where she in her sea and they in their sea had the property of command yet neither she nor they had offered to forbid fishing in their seas, much less passage of ships of merchandise; the which by the Law of Nations could not be forbidden ordinarily; neither was it allowed that property in the sea for whatsoever distance could accrue merely on the ground of possession of the banks for, if that were admitted, then the seas would all have been possessed by princes and no sea would have been common - an untenable position (according to the Civil Law). Therefore the Danish claims to possess the waters between Iceland and Scandinavia could not be admitted. (The logic may have been sound but the reference to the alleged freedom in the Adriatic was certainly unfortunate). Nevertheless, the instructions proceeded, should the King of Denmark be adamant and should he make a special plea for the reservation of the fishing, the envoys were, for the sake of amity, to concur in the issue of licences but on the condition that neither the King's nor the Queen's name appeared on the licence./



licence. In effect, expediency had been again preferred to the theory and the inclination.

XI. In forwarding the cause of the freedom of the seas with the possible reservation of a narrow coastal belt for territorial waters, Elizabeth was but following out the policy of her predecessors and the practice of the States around the North Sea; Denmark for this purpose is considered as within the Scandinavian group. The French Ordinances of the sixteenth and seventeenth centuries, regarding the office and jurisdiction of the admiral and for the regulation of the mercantile marine affairs, might well have been Scottish or English Statutes: (22) the language appeared applicable to the admiralties of all three States. There were common elements. There is the frequent phrase 'within or without the land' corresponding to the Scottish 'in fresh or salt waters', the areas within which the 'land fishing' was carried out while the Ordinance of Philip offering his protection and forbidding hostilities within sight of the shore has already been mentioned as the source of the Scottish 'land kenning'. England, as just noted, conceded a narrow belt of uncertain width of coastal waters to be within the jurisdiction of the adjacent State.

XII. The freedom accorded to the foreign fisherman illustrates the policy of successive English sovereigns, a policy which, even if it had not been that the bounds of her State were becoming too restricted for her subjects, allowed Elizabeth little option but to take her stand for the freedom of the sea. The effects/

(22) Trans. and summaries of the various French Ordinances in

effects of that policy of toleration were also to be seen in  
 (22a)  
 the decay of the fishing ports and the fishing fleets.

XIII. There is no trace of any restriction ever having been placed on the foreigner obtaining a share of the harvest of the seas and coming to the English ports. It has been suggested that this familiarity prevented the antagonism to the foreigner (23) so characteristic of the Scottish fisherman of the period. The alien merchant in Scotland was precluded from trading in the burghs except in bulk and then only with the free burgesses: his brother in England was well protected.

Item. It is ordained that all manner of hosts, as well/in the City of London, and the towns of Great Yarmouth, Scarborough, Winchelsea, and Rye, and also in all our other towns and places on the coast of the Seas and elsewhere through all the said realm, as well within liberties as without, shall from henceforth utterly cease and be amoved from their noyance and wicked deeds and forestallings, and in especially they be inhibited by our Sovereign Lord the King, that they nor none of them,..... shall any further intromit to embrace hering or any fish or other victuals under the colour of any custom, ordinance, privilege, or charter before made or had to the contrary which by these presents be utterly repealed; or privily or apertly do or procure to be done any impediment to any fishers or victuallers denizens or aliens being of the King's amity whereby they or any of them be compelled to sell their fish or other victuals, but where and when to any person whosoever they will within the said Realm at their pleasure....(24).

But the alien was protected at the fishing off England by treaty rights which the Dutch had probably desired but never obtained from/

---

in various MSS in the National and University Libraries, Edinburgh. Welwod - Sea Lawes Dedicatory Epistle.

(22a) See para. XIV. (23) Fulton 76.

(24) 6 Rich. II. Stat. c. 10, confirmed I Henry IV. c.18.

from the Scots.

(25)

'All the ancient treaties', says Meadows, 'I could meet with, concluded betwixt the several Kings of England and their old confederates, the Dukes of Brittany and Burgundy, which in those ages were the most powerful neighbours they had at sea, are all of the same tenor and run in the same form, viz., They covenant on both sides that their respective subjects should freely and without let or hindrance one of another, fish everywhere upon the seas, without asking any licences, passports, or safe conducts. This is the general form of them all. For example in the treaty betwixt Edward IV of England and Francis, Duke of Brittany, the Article, in French of that time, runs thus; Purront peaceablement aller par tout sur mer pecher & gaigner leur vivre, sans impechment, ou disturber de l'une partie ou de l'autre, & sans leur soit besoigne suis ceo requirir sauf conduct.'

Meadows then proceeds to recite some of the other treaties, including the Magnus Concursus of 1495. Nowhere, Meadows adds, is there even a nominal price demanded for the right to fish; the liberty, so far as England was concerned was granted deliberately without pretence of prior claim or restriction.

XIV The reason usually offered for the decay of the fishing ports of England was the decline in the amount of fish consumed after the dissolution of the monasteries and the slackness in observing Lent and the other fast days of the Church. There is probably a grain of truth in that assertion but it cannot explain why the foreigner should have supplied the English market with fish caught on the English coasts while the English fleets decayed through lack of use. The Dutch were more progressive and they had an advantage, at least for a time, in improved methods of curing the fish. Possibly the indolence which was afterwards attributed to the English fishermen may have had some/

(25) Anderson (Commerce) ii. Appendix 13.

(26) Fulton c.iii. (27) Motley. iii. 23 et seq.



some bearing. Whatever the causes bringing about the result, the fishing fleet was on the decline and the maintenance of the navy imperilled. Cecil, one of the most outstanding figures in the royal Council during the reign of Edward and Elizabeth, undertook enquiries into the extent and the source of the trouble. As a remedy, the strict observance of Lent was en-  
 (28) joined, and even those of rank were brought before the Privy  
 (29) Council for their offences. Even the butcher who was licenced to supply the French ambassador's sick wife with meat was under observation lest he supply more than sufficient for her purpose! The Scottish scheme of the reservation of the fishing for the natives or the closing of the fishing to foreigners on the grounds that the coastal waters were within the dominion of the Queen, as was the case in Denmark, could not have been attempted. Any such proposal would have struck at the Dutch with whom Elizabeth could not afford to quarrel in the face of the danger threatened from Spain. Instead, the solution attempted in Elizabeth's reign was the ousting of the foreigner from the home market and the coasting trade. In 1563 an Act 'Touching certayne Politique Constitutions made for the main-  
 (30) tenance of the Navye' was passed. Exemption was granted from customs dues on fish caught and handled by Englishmen; the purchase of fish at sea, with certain exceptions, was forbidden; and the sales of fish by the foreigner were seriously circumscribed. Further, the purveyors for the royal establishments were to obtain supplies only at agreed prices. Eliza-  
 beth/

(28) 35 Hen. VIII, c. 2. continued by various Acts until renewed for the last time by 1 M. St. 2. 13.

(29) P.C.R.E. 1543. A. 103, 104, 106, 112, 114. This would

Elizabeth retained her 'composition fish' payable by the fishers  
 (31) at Iceland. The Act cut deeply into established custom and practice of trade. The foreigners had been the chief suppliers of the markets and now they were excluded: the demand for fish could not be met. Licences had to be granted. The Act was unworkable. There were further repercussions. The alien fisher, who up to the present had worked amiably beside the native, took to destroying the nets and gear of the English to their great discouragement. Nothing/<sup>much</sup> was done for a remedy - only Elizabeth's political lent and attempts to exclude the foreigner from the home market; restriction of the fishing in the coastal waters was not dared to be attempted. There were others whose opinions were not weighted by the responsibilities of office, namely the pamphleteers, who wrote for the improvement of the fishing industry and the navy. Some of the schemes urged by the pamphleteers were to be tried out in the next two reigns. So far as the fishing industry was concerned times were ready for a change.

XV The claims of England to the exclusive jurisdiction upon the seas was thus restricted to a very narrow belt around the coasts and the bays. It was similar to the Scottish and equally indefinite. The sovereignty of the sea which was to be claimed

in/  
 would appear to have been a burst of energy on the part of the Privy Council. Most of the later mentions in the Records are in connection with applications for exemption. P.C.R.E 1575, 62 and 1576, 300.

(30) 5. Eliz. 6.; See also 13 Eliz. c. 11.s.5.

in later years had not existed. There never was any intention to claim an exclusive maritime jurisdiction or dominion until the Stuarts were riding for a fall. There had been times when the English navy had been of sufficient strength to have made a claim to the sovereignty of the sea effective in the manner of Venice upon the Adriatic, These were spasmodic periods of power but even then there was lacking the evidence of a claim to that maritime dominion upon which Mare Clausum was made to rest.



## Chapter V.

From MARE LIBERUM to MARE CLAUSUM.

I. The issue of reserved fishing within the coastal waters was brought very early to the notice of James I after his accession to the throne of England. In 1604 when he sought to bring about a closer union of Scotland and England, the Scottish Commissioners and, finally the Scottish Estates required that the fishings along the coast for a distance seaward of (1) fourteen miles should be reserved for the natives, "where nather Englishmen, nor any stranger, nor forinaris, have use to fische", a statement frequently made but, as already mentioned, of very doubtful accuracy. The attempt at closer union of the two countries failed but it impressed upon James (2) the importance of this conception of reserved fishings. The prospect of a debatable issue, which, if carried against the foreigner, would enhance his prestige, was also to his liking. Further, there was the additional revenue which might be obtained from taxes or other dues which were to be levied on the stranger for the privilege of fishing in the reserved waters. Yet these alluring factors would not have been potent enough to enable James, in less than seven years, to reverse the policy which the English sovereigns had followed for centuries. There was the rising feeling of jealousy of and antagonism against the Dutch/

---

(1) Appendix 8(a).

(2) Scots Statutes 1607, iv. 369(b); Craig -De Unione 467.

Dutch. They were represented as aiming at the monopoly of the world's trade and as a danger to England. Finally the common danger from Spain which had drawn the Dutch and the English together had now passed, at least for the time being.

4. Remarking upon the successful fishing of the Dutch, there were a number of promoters of schemes to force the Hollanders (3) from the fishing grounds and the markets. The schemes uniformly held out the prospect of handsome profit, if, this was the pons asinorum in all the schemes, the Dutch could be restricted in their fishing. Some schemes resting on privileges being granted at the expense of the established companies of merchants could not hope to succeed in deposing vested interests. In other schemes the attention of James was drawn to the fact that the Dutch laid a tax on all fish imported by foreigners into Holland and it was suggested that similar impositions should be levied in England against foreign caught fish. James of course was familiar with the assise of herring imposed in Scotland. (4) The royal reply to the complaints of harsh treatment and the multitude of proposals was not the imposition of the desired tariff but the famous proclamation (5) requiring licences - its authority, the royal prerogative, the exercise of his sovereignty upon his own waters in the interests of his own subjects to bring order (6) into the industry and revive the coastal towns. The negotiations which /

---

(3)<sup>4</sup> Fulton 136 et seq. In Chaps. IV. V. et seq. Fulton has given the result of his investigation of these fishery problems of the Stuarts. The problem of 'putting the fishing industry on its feet' has continued to intrigue even until present times.

(4) See note (1) supra. (5) Fulton 755.

which followed were typical of the later occasions when James was fortunate enough to bring the Dutch to discuss the subject of the fisheries. The Dutch argued that the proclamation impinged upon the principles of the Civil Law, that the sea was free to all and to appropriate it would be contrary to use and custom. A prince might have some jurisdiction over the sea as far as he could command by cannon stationed on the shore. (This conception is usually attributed to Bynkerhoek<sup>(7)</sup> who admitted that some authorities upheld the land kenning as the extent of territorial waters.) The imposition, the Dutch further asserted, was contrary to the treaties subsisting between the King and their country, especially the Scottish treaties of 1541, 1550, and 1594 and the English treaties known as the Burgundy Treaties, the principal one relied upon being that of 1496, the Intercursus Magnus. In addition, and this was the real difficulty from the Dutch point of view, any restriction of their herring fishing would spell ruin for the Dutch; so many of whom were dependent directly or indirectly upon the herring industry<sup>(8)</sup>. Later the Dutch defiantly declared they would not pay a single herring. As to the arguments, the Civil Law was still the greatest authority in international issues. In the Scottish treaties there is no available evidence/

---

(6) Fulton 145. (7) De Dominio c.ii. (8) Fulton 157.



evidence that the Dutch had ever obtained a declaration of the same freedom and right to fish as they had obtained in the English agreements. The Dutch had certainly had the right or privilege recognised in the latter, a difficulty the English negotiators never satisfactorily overcame. The counter argument of the English was that the practice of princes elsewhere sanctioned the appropriation of the seas and the right to levy dues from those fishing in the coastal waters. The Burgundy Treaties, it was averred, were no longer valid. The privilege had been conferred when the Dutch fishing was innocuous and impliedly subject to the condition rebus sic stantibus; it was now harmful. The Scottish assize of herring was advanced as showing the King's undoubted right to a tithe of the catch but the Dutch answered that the assize had never been paid in respect of the fish landed from the north and west seas and ~~only~~ <sup>only</sup> by the natives in respect of the landings in the east, an answer which is fully borne out by the (9) Scottish Exchequer Rolls. Meantime the operation of the proclamation had been suspended pending the completion of the negotiations. Then events in Europe abruptly terminated the proceedings. The sudden death of Henry IV of France, the head of the Protestant League, altered the political situation in Europe, and, in view of possible danger to the States and England, the proclamation was dropped. Substantially, victory lay with the Dutch.

III/

Meantime, in

III In Scotland, James had suffered a rebuff at the hands of the burghs whom he desired to build busses for the fishing to compete with the Dutch. On being asked the number of busses they were willing to build, the burghs replied that they had more than sufficient of the ships best suited for the fishing in the lochs and at the 'back of the Yles besyd the Fleymeingis' which fishing, if the natives of those parts could be restrained from their depredations, would be lucrative, easy, and available all the year round. Further, the means were lacking to furnish all the available ships for that fishing and there was therefore little point in asking the burghs to undertake the less profitable fishing upon the main seas. (10) It may be deduced from this that the Scottish fishing was still (1605) confined largely to the inshore waters.

IV It had been a weakness in the arguments against the Dutch that the Scottish assize of herring had never been levied on the native fishermen in the northern waters. To remedy the omission, James granted the assize of herring in 1610 to Captain John Mason who, with two ships of war, proceeded to collect the tax in the Orkney and Shetland Isles. The burghs resisted and obtained a decree of absolvitor from the Privy Council. On account of this decision the Duke of Lennox, Admiral in Scotland, when the assize was granted to him in 1614, was unable to have the grant confirmed by the Council in so far as the natives would/

---

(10) C.R.E. ii. 203.

would be affected. The Privy Council pointed out to the king that the native fishermen ought to be encouraged and not discouraged. The Council evaded the issue as to the tax on the foreigner by alleging that some, especially the Dutch, claimed to have a royal patent allowing them to fish there without impediment. The terms of the patent were not known but the Dutch were referring to the treaty of 1594. There was no copy in Scottish archives. (11)

V. Undaunted by this, and with the feeling against the Dutch still running high, James granted the assise afresh to the Duke of Lennox. Armed with a note from the Dutch Ambassador, granted to facilitate the collection of dues for ground leave, anchorage and other facilities, dues to which the Dutch had never objected, the Duke sent an agent to levy the assise and was successful. The consequent feeling in the Netherlands was bitter and in the following year when the agent, Mr Brown, reappeared for the purpose of collecting the tax he was mistakenly arrested and carried to Holland. It was a serious blunder. The States expressed regret, made reparation, but paid no dues.

VI. In the meantime the Scots fishermen by fishing in the waters claimed as exclusively reserved by Denmark engaged in retaliation. Complaint was made to the Scottish Privy Council in 1618, that the Scots had so injured the native fishermen that they could not meet their/

---

(11) C.R.B. ii. 455; P.C.R.S. x. 231; C.R.B. ii. 540; Fulton 167  
 (12) P.C.R.S. xi. 329.



their obligations. The Scots admitted having fished in the waters in question but, it was pleaded, they had been driven thereto upon necessity and by the violence of the Hollanders, who came yearly with two thousand sail, and above, within the King's waters, and within a mile of the 'continent' of Orkney and Shetland. Further, the Dutch, not content with the benefit that the liberty of fishing within the said bounds afforded yearly unto them, did very heavily oppress His Majesty's poor subjects and fishers. The Privy Council thought the trials of the Scots at home no warrant for their misdeeds abroad. The Scots were forbidden to fish within sight of the Island of Faero and were required to respect the fisheries there as reserved for the Danes ~~as~~ conform to the Law of Nations. At the same time the Privy Council requested that the Dutch be asked to respect the Scottish waters within sight of the coast as reserved for the Scots 'conform to the Law of Nations'. The Dutch asked for details of the charges against their fishermen, but, on the details being given, the grounds of complaint were seen to be very trivial. Nothing came of the Scottish claim to the reservation of the waters within a land kenning from the  
(13)  
shore.

VII Despite the complaints that the Dutch had impoverished  
(14)  
the fishing and destroyed the nets the Scottish Privy Council were reluctant to move alone in the matter. On being urged by  
the/

---

"(13) Fulton 175 et seq. (14) National Lib. MSS. 31,2.16

the King to take steps to exclude the Dutch from the fishing within sight of land, the Council pointed out that the Dutch were a friendly power and that matter really concerned both kingdoms. They also requested that the Dutch should be asked to prohibit their fishermen from the waters claimed by the Scots in accordance with the Law of nations. They suggested also that the King might threaten sterner measures. It was obvious that the Scottish Privy Council were not going to be responsible for any act which would lead to open hostilities. The Dutch, on their part, would not go so far as to prohibit their nationals from fishing in the waters claimed by the Privy Council but they clearly forbade interference with the Scottish fishermen. Indeed, the fishing was claimed as a right on the usual grounds of treaties, long possession and expediency.

VIII In a fit of energy James instructed the collection of the dues at the northern isles. Such dues were to be asked in a peaceful manner and what was offered was to be accepted  
(15)  
without question. A ship was fitted out for the purpose although it must have been known to the Privy Council that at that season there were no Dutch fishing boats in the northern parts. The precedent which James sought to establish was not created.

IX About this time trouble had been brewing with the Dutch as to the whaling at Spitzbergen. The issue there was whether there/

there were exclusive rights in the industry and, if so, to whom did they belong. The English had been there first; but they were not the discoverers. James went so far as to claim the waters around Spitzbergen as within his territorial waters. Quarrels and reprisals were inevitable. In the end the Dutch agreed to send envoys to treat with James. In anticipation of the envoys being empowered to treat of the <sup>principal</sup> outstanding questions, the fishing licences and the whaling, James had the Scotch records searched for precedents but without result. The Dutch were therefore to be called upon to produce their authority for their claims. However, the envoys arrived without the authority to deal with the fisheries. Forceful language was used by James towards the States General. He would not be taught the Laws of Nations by them or their Grotius. It would be to the advantage of the Dutch to acknowledge his right or it might come to pass that they would necessarily bear all the world before them with their Mare Liberum - might soon come to have neither Terram et Solum nor Republicam Liberam. The <sup>unusual</sup> forceful terms somewhat dismayed the Dutch but they knew the character of the King and played upon the political difficulties of the time and the inexpediency of attempting a settlement of so controversial an issue in such circumstances.

X       blindly  
James/persisted in attempting to levy the dues of the assize in the north and the Dutch appear to have successfully evaded the impost. During the later years of the reign the question/

question of the rights in the coastal waters was not sharply raised. The Dutch diplomacy with its 'artificial delays, pretences, shifts, dilatory addresses and the evasive answers' had attained its purpose.

XI. While the Scottish part in the herring issue had been prominent and had produced the very definite policy of the reserved waters, there was a crop of questions arising in England out of the King's proclamation of neutrality during the hostilities between Spain and her former provinces. The questions did not relate to the Scottish waters but the rights and duties of a neutral were for the first time to be put upon a definite footing.

XII The most important act of the King was the prohibition of belligerent acts within the King's Chambers or gulfs. In 1605 there were two proclamations forbidding hostilities in or warships hovering near the ports and roadsteads. (17) Instructions were also given that merchant ships should be given a start of two or three tides over any warship which might enter the harbour. Further, warships were not to be allowed to stay in harbour longer than was necessary for repairs or revictualling unless constrained to stay longer by stress of weather. To the modern mind these are reasonable requirements. It was then a definite advance to have them authoritatively declared. A decided advantage was the publication of a chart showing the prohibited areas. Hitherto, the areas of jurisdiction, if mentioned, were referred to in general terms. Only one party was dissatisfied/



with the modesty of the claims. Gentilis, the advocate pleading the Spanish cause in the English Prize Court, sought to have the English dominion extended beyond the limits in the proclamation to ensure a greater expanse of neutral and on that account safe waters for the Spanish ships. His contention was not admitted but it could no longer be questioned that recognition of a neutral zone beyond the limits of the harbours was now definite.

XIII. The effective exclusive maritime jurisdiction exercised by James was moderate and such as the most ardent protagonist of Mare Liberum conceded. His attempt to exclude foreign fishermen from the English coastal waters and the Scottish reserved waters had been unsuccessful. In that business he had gone far but had always stopped short of that point where resort to the sword would have been inevitable. His successors were to know no such restraint. Three times within the next quarter of a century the Dutch and the English were at War. Where James had sent a pinnace with two pieces of ordnance or a notary to 'take instruments' on the refusal of the Dutch to pay the assize, Charles sent his fleet amongst the fishermen to enforce the taking out of licences. He obtained but a paltry sum. The maintenance of the sovereignty of the sea was the declared policy of the King, Charles I, whose Chambers had been violated and upon whose shores the Dutch had landed an armed force to pursue and punish the pirates who had haunted the English coasts. Charles was determined that he alone would ensure peace upon/

✓(18) Gentilis Hispanicae etc. e. c. 8; l. c. 2.

^(19) Fulton 309

upon the English seas. Such was the excuse for the levying of the notorious ship money. A fleet was provided and the fleet achieved nothing. But it is unnecessary to enter into the details of the political drama which followed. The fact that the Commonwealth was substituted for the Monarchy did not in the least affect the issue of the territorial waters. Nor is it necessary to recount the events in the naval warfare. The interest arises through the issue of territorial waters being unduly prominent in the struggle between the Dutch and the English. It was almost entirely an issue in which Scotland, for want of a substantial naval force, had little interest. There the fishery question was to be led to the front. Nevertheless, this period represents a phase in the history of the evolution of territorial waters and cannot be passed without some mention. It is important that the result of the struggle was that Britain became 'Mistress of the Sea'. Whatever policy Britain was to adopt towards territorial waters, and it was not Mare Clausum, would, on account of her 'mistressship', have great weight with the other maritime nations.

Either England or the United Netherlands had to make way for the other. So bitter was the animosity on the part of the English that the officials at the Admiralty and the officers of the fleet grasped every opportunity of impressing upon foreigners the dignity of the English dominion upon the seas. The measures such as requiring all ships to give the salute or 'vail' even in distant parts was the most irritating and produced/

produced no result to the English except the satisfaction of  
(20)  
their vanity.

XIV Most, if not all, admiralty instructions required that naval vessels should always receive the salute. This salute, or 'vail' was an old established measure adopted by vessels to suppress piracy. It has been traced in England to the reign of  
King/

(20) The vail was undoubtedly prized by England and also by other States but not to the same extent. Sir Philip Meadows was the first English writer to place a proper construction upon the essential difference between the Dutch and the English.

'The Dutch steer their course by the Pole Star of trade and not by the Punctilios of Honour'. Anderson (Commerce) App.

The precise requirements varied but there is no gainsaying that the primary object was to permit of visit and search to establish the character of the vessel challenged. The Venetians required that a boat be despatched to the examining ship with the ships papers. The French Ordinances have been noted by a translator:

'When any ship upon summons by man of war shall without resistance strike sail and show the pass, charter party and bill of lading there shall be no violence done'.

National Lib. MSS. 6.21.

It was agreed by England to give the salute to Venetian ships in the Venetian waters. The Venetians even required the salute to be given to their state ships in Turkish waters but that practice was of doubtful authority. The Turkish patrol against pirates was ineffective and the Venetians assisted in that task. The Venetian justification was that the requirement of the vail was aimed against pirates. The English admiral was accused by the Venetians of attempting to persuade the Turkish admiral that his jurisdiction had been infringed by the demands of the Venetians. The Venetians did not raise the salute higher than a token of respect and it was in this sense that the English eventually agreed to give the salute.

State Papers (Venetian) 28th May, 1605,  
and 24th September, 1605.

See also Twiss <sup>28 + 29</sup> 143 & 144; Marsden Vol. i & ii 'salute' and i. intro. xiii; Boroughs 31 et seq. and page 52 ante as to the Scottish conception of the implication and purpose of the 'vail'.

King John. Vessels were then enjoined to drop the topsail and lie to the lee to facilitate the search of the ship, the examination of its papers and the establishment of its innocent character. Ships refusing to give the salute were regarded as pirates and treated accordingly. In time the vail or striking of the flag came to be regarded as a token of respect paid to the ships of a Sovereign. Thus there were instances before the reign of Charles I where the salute had been forced from strangers approaching the coast. The English ships had always expected the salute in the Narrow Seas but it need not have been accorded on every possible occasion: ships of other states probably claimed the salute there from suspicious vessels. However, Charles I, the Commonwealth, and Charles II contended that the giving of the salute recognised the sovereignty of the seas, the other nations appear to have continued to regard the vail as a token of respect. The Dutch declared their willingness to accord the salute as a mark of respect to the sovereign, even if their own fleet should be superior in numbers to the English, but never as a token of their subscription to the English claim to the sovereignty of the seas. (21) The French appeared more reluctant to accord the salute. Under the guidance of Richelieu, the French were building up a naval force and causing some anxiety to the English. Yet, when the English ship money fleet which was to accomplish so much cruised ludicrously about the Channel and along the French coast looking for vessels to force them to strike/

(21) Feodera <sup>DUNN</sup> VI. 11, 74, 422. VII 1, 44 & 253.



strike and acknowledge the sovereignty of the King of England upon his seas, Richelieu discreetly kept his fleet out of the way. The pretensions to extravagant maritime sovereignty became still more ridiculous when the officers of the fleet demanded the salute not only upon the high seas but also in the harbours and under the guns of the forts of other sovereigns where obviously the English had no claim to dominion. Certainly, the instructions to the captains differed from time to time according to the caution of the royal advisers and the strength of the force against the English ships on the particular occasion. The absurdity of the construction placed upon the salute is evidenced by the action of Charles II in sending his yacht amongst the Dutch Fleet in the hope that they would not strike. Failure to give the salute would have furnished a popular casus belli, so Charles thought, thus enabling him to carry out his scheme for an alliance with France. William III also claimed that the failure to accord the salute was a casus belli against France.

XV. The requiring of the vail was but a pretext and a sham; the struggle was to exclude the Dutch from the North Sea and the Channel, and thereby to achieve the ruin of their fishing and their maritime carrying trade. When these objects had been attained the freedom of the seas could be safely restored. The episode of Mare Clausum was but a passing phase. It was not maritime dominion which was at stake but maritime supremacy. The basis of the success of England was laid not by insisting upon the vail but by the genius of Cromwell in creating a navy/

navy, efficient and worthy of a leading maritime power. So great an issue could not be settled in one or two brief reigns. The coming storm had cast a shadow over the closing years of Elizabeth's reign; it had not finally passed away until the close of the Napoleonic Wars. The period from the reign of Charles I to the close of the reign of James II was the period of its greatest intensity; it was the time when the claims on the part of England to territorial waters were the most pretentious and the most vague. The 'Four Seas', the 'British Seas' may have been claimed to extend from Norway to Spain but the true measure of their extent was the strength of the navy.

XVI. Before passing to note the juridical controversy for which this period is famous there was one incident worthy of mention in connection with the territorial waters of Scotland and which represents the maturity of the Scottish claims and also the greatest extent of waters claimed by the Scots. Charles I's attempted exclusion of the Dutch from the fishing, as a means of asserting some show of his maritime dominion, has already been noted. Plans were not long in forthcoming for the formation of a fishing company under royal patronage. In 1626 and 1628 proposals were before the Commons for the imposition of dues on fish landed by aliens, the proceeds of the tax to provide a navy. The proposal to form the fishing company received the personal support of the King; Scottish obstinacy was to be a perennial obstacle to the success of the company. The fishing around the Scottish coasts and particularly at/

particularly at the Lewis was desired. To obtain this, it was necessary that the Scottish Estates, the Scottish Privy Council and the Scottish burghs, who held fast to the perennial claim to the reserved fisheries, be brought over to consent to forgo in great measure the claims which they had always trumpeted whenever opportunity offered.

XVII. It so happened that the burghs were at the time protesting against the grant to the Earl of Seaforth of a Charter to erect the town of Stornoway into a burgh: he was also charged with the heinous offence of introducing the Dutch into the Lewis for the (22) fishing. The burghs, apart from their objection to the proposed erection as in breach of their privileges, argued that the Dutch would destroy the native fishing and monopolies of the trade of the seaports as had happened elsewhere: this was an unintended tribute to the skill and energy of the Dutch. The Dutch, it was averred, (23) had committed great oppression along the coasts. This was the first check to the scheme for the Company. An opportunity was taken by the King to ascertain from the Town Clerk of Edinburgh being then in London to protest against the Seaforth Charter, the profits likely to be gained from the buss fishing in Scotland. A glowing account appears to have been given but, it was erroneously added, no foreigners had ever been allowed to fish within the (24) waters reserved for the natives. Reservation of the waters would be fatal to Charles's scheme. The plan was laid before the Scottish Privy Council by the King who pointed out that the/

---

(22) Appendix 9. (23) C.R.B. iii 257 & 291. (24) Appendix 9.

the benefits of the fishing could not be 'dividedly enjoyed'  
 (25)  
 by any one nation. It was patent that the burghs must resist  
 the scheme or for ever cease to claim their privilege. The  
 burghs attempted to side tract the definite issue as laid  
 down by the King by asking that the Flemings be restrained  
 from fishing in the reserved waters, that the projected  
 (26)  
 company be abandoned, and the fishing restored to the Scots. The  
 Estates lent their support. They pointed out to the King that  
 the fishing reserved was the 'land fishing' within the sea locks  
 and the isles and a coastal belt within a double land kenning  
 of the shore. (This last was a patent extension of the previous  
 claims.) It was also stated that the proposed company would be  
 very inconvenient to the Estates and that the fishing had  
 always belonged to the natives without previous interruption  
 from the Dutch. The claims to an uninterrupted enjoyment of  
 an exclusive right was ever advanced despite the recorded com-  
 plaints as evidence to the contrary: vis à vis England the Scot-  
 tish burghs and Estates were taking a stand upon the abortive  
 draft Treaty of Union of 1604.

XVIII. The King resolutely addressed a note personally commend-  
 ing the scheme for the company to the Scottish Privy Council and  
 requiring haste in the appointment of plenipotentiaries to deal  
 with the English commissioners. The Scots, the records show, were  
 very definitely instructed as to what they were to require and  
 what they must resist. Substantially as to fishing the  
 English/

→ (25) Scots. Statutes v. 220(b) to 243 give an almost continuous  
 record of the proceedings and correspondence.

(26) C.R.B. iii. 262-3, 265, 275-6, 279 & 300, 322 & 323.



English were to be treated as foreigners. The instructions claimed more than the usual: the Scottish territorial waters were now to extend to midway between the coasts of Scotland and the Continent. This familiar rule of the Civil Law, the *Thalweg*, had been frequently mentioned in connection with the claims to maritime dominion elsewhere but this was the first occasion it had been authoritatively advanced in connection with the Scottish claims. It was their swan song. The instructions denied that the English had any right to fish in these waters except by virtue of the company's privileges. The sacred waters within the land kenning were as sacrosanct as ever: membership of the association was not to be sufficient to admit the Englishman, being a denizen not a national, to the right of fishing there. In consideration of allowing the Company the privilege of operating in Scotland the Scots claimed the right to take part in the English pilchard fishing! Detailed particulars were demanded by the King of the fishing areas which the Scots considered the minimum required for the sustenance of the country. The burghs, although they held details to be unnecessary, complied. Their statement is interesting as it is the first authoritative, detailed statement of the reserved waters. The following 'chambers' were claimed:- on the east coast, from St Abb's Head in Berwickshire to Red Head in Angus, From Buchanness to Duncansby Head; on the north and west, from Stour of Assynt to the eastmost point of/

of Lewis then south by a line fourteen miles seawards west of the Hebrides to Bara and thence to Islay, and from Islay to the Mull of Kintyre and across to the Mull of Galloway. The area was increased by the inclusion of shore waters within a line drawn fourteen miles seaward along those parts of the coast not included in the chambers. The chambers also were increased by drawing an ideal line fourteen miles seaward and parallel to the line between the headlands. The Orkney and Shetlands were also encircled by a line fourteen miles seawards of the outer points of the islands. The Privy Council purported to revise the details but no substantial alteration was made.

XIX. Immediately the King set about taking the Council to task. He required the boundaries to be revised and the claim truncated. This resolution of the King routed the burghs. They conceded much but continued to claim the Firth of Forth, the Moray Firth with unaltered limits and the waters between the Mulls of Kintyre and Galloway. A strip of water was also claimed along the coast from Red Head to Buchanness as essential to the natives and for the preservation of the salmon. The proposals were again revised and adjusted by the Council. Charles was still dissatisfied. He took a personal part in the subsequent negotiations and browbeat the opposition by threats of ignoring the reserved waters for the fishing as being essentially a matter within the province of the royal prerogative. In 1632 the charter for the company was granted. The Scottish claims had been whittled down to the Firth of Forth and Firth of Clyde. The Moray Firth Charles would not concede.

XX. Inexperience, mismanagement assisted by the depredations of the Dunkirk pirates, and active hostility on the part of the Scots brought the Association into low water and to a lingering death. Sometimes in nature full maturity is reached only in a final, admiration compelling, supreme but unavailing effort for continued existence. So it was with the Scottish claims. The opposition to the formation of the Royal Company had called forth their last ounce of strength. In the negotiations with the King the claim became more definite and the waters as clearly defined as the King's Chambers in England. There the delimitation was desired for the purposes of neutrality and concerned the subjects of other princes. In Scotland the purpose was the fishery reservation; the parties were the subjects of the King's other kingdom. Consequently it cannot be advanced that the Scottish claim was more than a domestic affair: on the other hand, since the English were in many respects 'foreigners' in the eye of the Scot, the claim which had been formulated so definitely on this occasion would not be readily forgotten when continentals were the 'other party'. The tradition was invoked in the early years of the 18th century in the Admiralty Court's commission to Adair to seize foreign vessels fishing in contravention of the law. Charles II, so General Monk hinted, intended to grant a concession to the Dutch which they would prize and the citizens of Bruges obtained a charter under the Great Seal to enable them to fish, as they did, in any part of the Scottish waters. In 1848, the Government, for their own ends, declared the charter spurious.

(27) Appendix II (b); (28) Scots Stats. 1657 VI ii, 908(a).

(29) National Lib. MSS. 25.3.4. Fulton 461.

## CHAPTER VI.

## XX The Juridical Controversy and William Welwod.

I. The controversy as to the freedom of the seas which raged throughout the period covered by the preceding chapter was justly famous, for not only was every maritime State interested in the discussion<sup>and its outcome</sup> but also the leading jurists took some part in the "battle of the books": further, from this International Law emerged as a system. (1) While the freedom of the seas was the principal theme of the controversy, the De Jure Belli ac Pacis of Grotius, published in 1625, covering the whole gamut of international obligation, as then understood, gave an impetus to the study of International Law as a systematised subject and not as a series of discrete heads. In addition, publicists were now appealing to reason and to conscience: implying thereby that a moral basis had been built into the foundation of Public law. A comparison between the former attitude and that brought about by Grotius may be obtained by reference to the arguments of Grotius in his Mare Liberum and those of Welwod in his Abridgement of all Sea Lawes. Both touched upon the fisheries. Welwod confines his arguments to the recognised authorities of Scripture, the Civil Law, and the practice of princes. His arguments, though subtle, are not always convincing. Grotius, on the other hand, while not disdaining the classic authorities, achieved more to his purpose when he branded the anticipated attempts of James I to levy dues/

---

(1) Grotius De Jure Belli etc. Intro. ~~xliv~~ xxix. xlviii



dues from the poor fishermen as 'insanely cupid'. No writer on International Law has contributed as much as Grotius to the welfare of the commonwealth of nations. His work has been criticised and has aroused a controversy, the keenest ever known in international law: in his work, De Jure Belli ac Pacis, Grotius has left a monument of his own creation which posterity has admired and revered down the ages.

"The first systematic treatise (De Jure Belli ac Pacis) had its birth in a court of justice; its principles are developed like the principles of law; they are studied in the universities of the world; they are applied in the chancellaries, in municipal courts of justice, and in our day an international court of justice has been established to apply them to disputes between States in the royal residence of the country of which Grotius was and remains one of its chiefest glories".(2)

II. If, however, attention be directed to the subject of the freedom of the seas, it will be observed how much the controversialists were enslaved to the views of their State. To this rule Sir Philip Meadows appears the sole but brilliant exception. Craig, the Scottish Jurist, although not writing to this point, was liberal minded also. The Mare Liberum of Grotius was directed ostensibly to assist the Dutch against the Portuguese claim to the maritime and commercial monopoly in the Far East: the reference to the fisheries was a corollary to meet the possible contest with England. Selden, Grotius's best known opponent, wrote at the behest of Charles I; the Venetians defended their sovereignty on the Adriatic; and Welwod, the 'ingenious Scotch lawyer', argued in defence of the Scottish reservation/

(2) Grotius. De Jure Belli etc. Intro. xxix. c.f. Walker 333-7 and Phillimore 1. xxi

(3) See Bib. (4) De Unione Regnorum Fol. 258.

reservation of the coastal fisheries. Small wonder then, some of the arguments were unconvincing and facts strained or distorted to be prostituted to the particular view sought to be advanced. The weight and importance attached to Mare Clausum and Mare Liberum by the respective governments of England and Holland were never in doubt: the arguments culled from Mare Liberum, were frequently on the lips of the Dutch envoys; a copy of Selden's Mare Clausum was preserved by order of Charles I in the archives of the Courts. (5)

III. Selden and Grotius had their camp followers, distinguished writers and many whose name did not live for evermore. Yet, if the essay of Bynkershoek, De Dominio Maris Dissertatio, a most impartial and persuasive work, is added to Mare Liberum, there is nothing fresh to be said for that side of the controversy: Mare Clausum contains all that could be said for the other. Unfortunately for Selden's influence, Mare Clausum was not to become the permanent policy of Britain. Claims to extensive maritime dominion were tacitly dropped when the competition by other States with Britain ceased to threaten seriously. There may have been a recrudescence of competition in modern times but Mare Clausum has <sup>not</sup> been disinterred. The root basis of the problem <sup>in earlier days</sup> ~~then~~ was to escape from scarcely understood economic pressure. The lists chosen by the contestants were in the almost unknown terrain of international law: the result was that that factor in civilisation was elevated to its proper importance. It does not follow that adequate recognition/

recognition was or has<sup>yet</sup> been accorded to International Law in the councils of nations.

IV. Apart from the short period when Cromwell effected a temporary union of Scotland and England, Scotland was a sovereign State although both countries owed allegiance to the same crowned head. The quarrel with the Dutch was essentially between England and Holland and, apart from the fisheries, Scotland had comparatively little interest in the maritime issues. The interruption of the sea borne trade, inconvenience and no great distinction were Scotland's portion. In the juridical controversy William Welwod was to bring some distinction to his country. As Professor of Civil Law at St Andrews University, it probably fell to him to touch upon the Law of Nations in so far as it was included in the syllabus of the subjects offered. At the same time he held an office in the Church which would bring him into close contact with the seafaring population. He was therefore well suited to play the part in presenting the arguments in favour of the Scottish reservation of the coastal fisheries. To this intimacy with the seafaring may be attributed Welwod's first essay in 1590 into the region of mercantile marine law - the Sea Lawe of Scotland, shortly gathered and plainly dressit for the reddy use of seafairing men. An admirable, unpretentious, little work, it was of considerable value to those for whom it was intended, viz., merchant, master and mariner. The book nowhere touches upon the Law of Nations for its purpose did not require it.

---

(6) Dictionary of National Bibliography. Welwod Sea Lawe of Scotland etc. Intro.



V. A more ambitious work, the Abridgement of All Sea Lawes, followed in 1613, 'to mende a weake piece of labour ', his Sea Lawe of Scotland. The book is really a compendium of the maritime laws and customs generally recognised by and affecting merchants and mariners engaged in foreign trade. In addition there are snippets from the Civil Law dealing with the sea and a chapter dealing with public or state ships. The whole is wonderfully condensed. Welwod may have intended to serve two purposes with his new book, (a) to extend the usefulness of his former work by giving a summary of the laws and customs with which the Scottish mariner engaged in overseas trade ought to have been familiar, and (b) to direct the attention of the authorities and the maritime people generally to the attack launched in Mare Liberum against the cherished reserved fisheries. The second purpose is the more important here. The dedicatory epistle discloses that Welwod had no doubts that this was the chief interest in his book. Strangers should be

"stayed from scarring, scattring, and breaking the shoals of our fishes; namely upon our coasts of Scotland."

That the book was written in the vernacular shows that it was intended for popular circulation in Scotland and England. It was dedicated not only to the Duke of Lennox, the Admiral of Scotland, but also to the admirals of England. Consciousness of the inadequacy of this reply to Mare Liberum constrained Welwod to publish his De Dominio Maris two years later and in Latin, the appropriate medium to reach continental scholars.



VI. Apart from the twentyseventh chapter dealt with in the next paragraph, the Abridgement does not profess to deal with the Law of Nations. There is, however, one paragraph of passing interest as to whether a naval prize taken into the port of a neutral should be released. Welwod, founding upon the Jus Postliminii of the Romans argues that it should. The point appears to have been a topic of some importance then and later. Welwod merely mentions 'ports' or 'roads' as the King's jurisdiction for this purpose. He was writing in very general terms and probably intended to include Firths. As already noted the King's franchise extended over the Forth as far as the May Island. The next point is of more importance.

VII. The twentyseventh chapter, where Welwod rises to his height, is avowedly a repudiation of the arguments of Grotius. Welwod had just read a 'learned but subtle treatise (incerto auctore)' containing in effect a —

'plaine proclamation of liberty common to all Nations, to fish indifferently on all kinds of seas, and consequently a turning of undoubted properties to a community.....'

Welwod had no difficulty in enlisting the aid of Scripture and the Civil Law to confound the arguments of Grotius. He was in general agreement with Grotius as to the freedom of the high seas: the difficulty was where did the territorial waters end and the high seas begin.

'And/

---

(7) See page 31.

'And therefore,' says Welwod, 'I would meet him (Grotius) with his deserved courtesie; even to proclaime Mare Liberum also; I meane that part of the maine sea or Great Ocean, which is farre removed from the just and due bounds above mentioned, properly pertaining to the nearest lands of every Nation.'

VIII. Thomas Craig, Welwod's contemporary and one of the foremost of the Scottish institutional writers, in his scholarly Jus Feudale, confirms Welwod's view of the scanty evidence in the municipal law in support of the theory of the reservation of fisheries. Not the least valuable feature of Craig's work was his wide view of the objects and purposes of law as deduced from a study of comparative jurisprudence. He saw Law as a system evolved to meet the needs of the State and its civilisation. He recognised with Welwod the handicaps of his native country. Navigation ought to be unimpeded, says Craig, but the oceans are by the practice of princes appropriated to the nearest mainland.

"Jurisdiction in the case of any offence committed at sea thus belongs to the king of the territory most nearly adjoining, who reckons that part of the sea his own. It must also be admitted that a particular State may prescriptively acquire right to a particular portion of the sea; Venice for example claims the whole of the Adriatic, although it lies between the territories of other States.

SEA-FISHINGS.- The fisheries in those parts of the sea adjoining the coast belong without doubt to the country to which the coast belongs. We are only too familiar with the injury done to our sea fisheries by the Belgian fishermen who ply their trade round our islands. While it is true that the fishing in the sea is free to all, yet are the sea fisheries subject to prescriptively acquired rights and become open or restricted according to the sanction of customary possession." (8)

According to Craig then the Scottish fisheries were not restricted or reserved for the natives, since the Dutch also enjoyed them under circumstances which gave cause for objection/

objection by those who might have resisted but were unable to do so effectively. The jurisdiction exercised by the Scottish sovereign has already been shown to have been meagre, not exclusive, and overshadowed by a personal as distinct from a territorial jurisdiction. Both Welwod and Craig sought to apply continental practice and principles to the waters adjacent to the Scottish coasts. In this they had not very effective and immediate support. At the same time, they ~~may have~~ ~~and~~ probably ~~and~~ influenced the Estates and the Privy Council. The maturity and definition which the Scottish claims to the reservation of the fisheries later attained were doubtless fostered by their writings.

IX. Two years later Welwod extended his twentyseventh chapter of the Abridgement. He did not claim the De Dominio Maris to be a separate work, but substantially it was such. It was a more methodical presentation of his arguments. He takes Grotius to task on the fluidity of the sea and argues that man had attained sufficient knowledge to mark off limits thereon with ideal lines. On the point of the freedom of fishing, Welwod takes his stand on the belief that it is possible to exhaust the fisheries. Then there is the age long controversy as to the status of the sea under the Civil Law, whether it was <sup>res</sup> communis or res publica, and, according to the view taken, whether it could be appropriated. Such discussions based upon dicta inapplicable to the circumstances of the case could not serve any useful purpose. As to the limit of the Scottish reserved waters, Welwod definitely asserted the popular notion that/



that the Dutch had agreed to keep off at least eighty miles from the Scottish coasts and, if carried into territorial waters by contrary winds, they had to pay a tax at Aberdeen; a castle had been built there for that purpose. Welwod was here relying on tradition; and tradition was very misleading where the burghs were concerned. There was no foundation for the belief. The eighty miles limit was another version of the provisions attributed to the treaties of 1850 and 1894; storm stressed ships were usually favourably treated, and, having paid the harbour dues once, they were not called <sup>to pay</sup> upon/a second time if forced to return by stress of weather. However, theory apart, Welwod and Craig could say from first hand knowledge that the Dutch fished within sight of the Scottish shore and that the Scottish fishermen were grieved by the proceeding which they were powerless to resist.

X. Welwod was not so fortunately situated as to weaken the authority of Grotius: that was more a task for Selden with royal favour and every facility which authority could offer. Welwod spoke of the Scottish reserved fisheries; Selden incorporated the material in his chapter on Scotland in Vare Clausum. Welwod did not have the erudition and neither <sup>the</sup> facilities for access to records nor the favour of a king: his intuition and experience in a more humble sphere led him to be the first to observe and appreciate the serious implications of the Grotian challenge.

Welwod /

8(a) See reference to this in appendix 9.



Welwod was the first to take up the gage: he was the only  
 (9)  
 opponent who provoked a reply from Grotius.

To Welwod also belongs the distinction of publishing the first collection of the national laws of Scotland relating to maritime adventure. It was an afterthought that took Welwod into the "battle of Books". By using the vernacular for his Sea Lawes and the Abridgement he showed a fine perception of the needs of the bulk of his fellow citizens and placed the problem before them in a simple and concise statement. Single handed he then engaged his opponent in their own language of learning. One is constrained to think that had Welwod not been almost invariably against those in authority suitable recognition of his genius would have brought greater reknown  
 (10)  
 to Scotland not only in international law but in other spheres.

---

(9) Fulton 342

(10) Welwod devised a suction pump for delivering water from coal mines to render deep mining possible. In some measure he anticipated the discoveries of Sir Isaac Newton. MSS in Edinburgh University Lib. (Laing Series.)

## P A R T II.

## C H A P T E R 1.

General historical background to the development of the  
International Law of Territorial Waters.

I. In the period covered by the preceding portion of this essay, it had come about that almost all the seas were claimed to be under the dominion of one state or another, despite the obvious inability of the States to make the claims wholly effective and irrespective of the situation of the waters relative to the territory of the State. In this, the second or modern period, maritime dominion is admitted only over the narrow belt of waters immediately adjoining the territory of the State. The change was inevitable although the necessity was not immediately recognised. Towards the close of the earlier period, England, the staunch upholder of mare clausum in the home waters, had been no less energetic than the Dutch, the protagonists for mare liberum, in breaking the maritime, commercial and colonial monopolies of Spain and Portugal in the West and the Far East. The opinion has  
(1)  
been expressed already that the controversy as to the British Seas was but a minor issue in the struggle between the Dutch and the English for place as the leading maritime nation/

---

(1) Pt.I. p.85.



nation. Other nations beside the Dutch had been affected, but only in proportion to the strength of their competition, or possible competition, with the English. As soon as the Dutch had fallen definitely behind so as no longer to be serious rivals, and the British fleets had proved their superiority over the other fleets of Europe during the Napoleonic Wars, the irritating demands for the recognition of the empty formalities, held to be symbolical of the British dominion on the "British Seas" were tacitly abandoned. <sup>(2)</sup> Indeed, it may be questioned as to how far the bombastic claims of Selden's Mare Clausum were ever authoritatively accepted in England as being endorsed by international law. The English Prize Courts were careful to restrict their jurisdiction for the purposes of neutrality to the areas delimited in the royal proclamations prohibiting hostilities in the territorial waters as being within the King's dominions, viz., the King's Chambers, the harbours and their immediate vicinity. <sup>(3)</sup>

The claims of the other European States to extensive maritime dominion quickly fell into abeyance or were replaced by assertions of sovereignty over very restricted belts of waters along their coasts. This process of restriction or substitution was materially quickened by (a) the British naval measures and success, <sup>and</sup> (b) the writings of the jurists which influenced the policy of national executives, public opinion and the decisions of quasi-international prize courts.

A/

---

(2) Hall 185.

(3) Fulton pp. 553 & 554.

A third influence was the revolutionary change in political and economic thought which favoured laissez faire to the detriment of monopolistic, restrictive factors which had fostered the former extensive claims. Today the right of the freedom of innocent navigation, even in territorial waters, is universally admitted. In other spheres there has been a rise of nationalism combined with totalitarianism and it may be that before the world has again settled down to a state of equilibrium another chapter in the historical development of the law of territorial waters will have been written.

II. It cannot be claimed that there has been a distinctive or considerable Scottish contribution to the development of the international law of territorial waters as understood today. As in the earlier periods, the principal theme of international import to day is the reservation for nationals of the coastal fisheries, particularly those in the Firths. On the one hand, there is a possibility that a Scottish national policy would have aimed at the reservation of a belt of waters of greater width than three miles from the shore; on the other, it may be doubted whether such a claim would ever have been accorded international recognition. Similar issues have arisen elsewhere and have been the subject of inter-state conventions. These, therefore, are of some importance as suggesting the international law applicable to the territorial waters of Scotland.

In regard to the other aspects of international law  
which/



which come within the scope of this essay, the Scottish contribution is merged in that of Great Britain. The identity of Scotland as a sovereign power, obscured by the Union of the Crowns, was finally lost by the Union of the Parliaments. Thenceforth, the national policy and executive voice was that of

(4) Britain. There is, however, some evidence in the later records of the Scottish Admiralty Court, which retained its prize juris-

(5) diction until 1825, indicating that that Court, with little or no restriction imposed by municipal law, was prepared to admit the persuasive force of the decisions of the English Court

(especially the opinions of Sir William Scott, <sup>Lord Stowell</sup>) the practice of foreign States, and the opinions of the leading jurists, the whole being interspersed with and eked out with the Civil Law.

(6) Bell, in his Commentaries, summarizes in a eulogy the sources of the maritime law of Scotland as being the ordinances and customs of maritime States as the most important, including therein the ancient codes of Oleron and of Wisby, and the more modern Ordinance of Louis XV with Valin's Commentary thereon.

He /

(4) Even before 1707 the Crown dictated a common course to be followed by the Admiralty Courts of Scotland and England.

"We do appoint certain rules and Directions to be observed in our High Court of Admiralty of that our Antient Kingdom, in the adjudication of Prizes, according to those that Wee had ordered to be observed in the High Court of the Admiralty of England." Letter from Charles II dated 18th Dec. 1680.

Acts of Sederunt Vol. I. p.80.

In the next few years the Crown would appear to have dictated even the terms of the sentence to be passed in particular cases of difficulty to the Court! Ibidem. Letter from the Court dated 27 January 1685 and the King's reply dated 28 Feb. ib page 143.

(5) 6 Geo. IV., Ch. 120, s.57. (6) III.IV. Intro.

He adds the determinations of other marine and mercantile Courts.

"But the decisions of the greatest authority are those of the High Court of Admiralty of England... It is the greatest tribunal of maritime and international law, the functions of this high court have during the whole of an unexampled period of difficulty..... been performed by a person the most eminently qualified to sustain the character of an international judge... Wherever those decisions (of Lord Stowell) touch any question discussed in our Courts their authority is received with profound respect."

As regards the jurists whose opinions might be referred to Bell states that the list is too formidable to detail but he gives the principal ones including the English writers, Maline, Molloy and Beawes.

More instructive as to pleading, however, is the report of a case in Morrison's Dictionary. <sup>(7)</sup> Here is a voluminous array of heterogeneous authority which includes reports of decided cases, references to treaties, opinions, codes of sea laws, different works of Admiralty and the Marine Ordinances of France, treatises on the Scottish Admiralty, Xenophon and the Holy Writ. We find the works of Grotius and Bynkershoek and Molloy cited with the Civil Law. Yet, against such pedantic pleading may be set the following passage illustrative of the new conception <sup>(8)</sup> of international law.

"But what is still stronger than a thousand opinions of lawyers and doctors, the general practice of both British and French nations in the course of the present war..... The authority of Albericus Gentilis and Bynkershoek..... can have no influence against the general and later practice of nations."

Better/

---

(7) Wake et Att. v Bauerman. 1801. Morrison's Dictionary  
Prize - Appendix Part 1. No. 1. p.2.

(8) Benton v Brink (1761) Morrison's Dictionary. p. 11,949.

Better still is the opinion of Judge Admiral Cay, the Scottish counterpart of Sir William Scott in England, who achieved in Scotland a measure of success in building up a body of jurisprudence relating to international and maritime law.

"The Law of Nations is a law of consuetude.... Now I find that it has been the practice of the Courts of Admiralty everywhere..... It has been done by the English Court of Admiralty .....(At this point it would appear from a note in the record the Judge quoted verbatim from an opinion of Sir William Scott as given in Robinson's Reports, Vol.2 at p.209)... For the same reasons more ably stated by that upright and learned Judge I am clear for repelling....."(9)

These citations show that, as far as a purely Scottish authoritative organ of State could have assisted, the development of international law would have followed a course reflecting the general practice of nations and that international law, as interpreted in the national courts, would have been international in breadth of outlook and interpretation. (10)

III. To observe the first stages in the disintegration of the former vast maritime dominion claimed by Spain and Portugal, attention must be directed elsewhere than to Europe. As already mentioned, the Dutch and the English had breached with their trading stations the Portuguese monopoly in India and the Far East; in the West the British, by the permanent possession of Jamaica, had shown the futility of the Spanish claims to exclusive rights in America. The grant of the Assiento, first to Portugal then to France and, finally, by the Treaty of Utrecht, to Britain, together with the right under the same treaty to trade with/

(9) See Appendix 10. (10) Bell's Comm. III.IV. Intro. MSS. snippets of collections of decisions of early date only are available except those reported by Morrison and the relic, Curiae Admirallatus Scotiae, (1557- 1561/2) now printed by the Stair Society. Later records are in H.M. Register House. Edinburgh. *(unrevised and undated)*

with one ship per annum with the Spanish American colonies, were but wedges driven deeply into the regional commercial monopolies in the newer and more distant regions of the world. Once the exclusive trading rights had vanished, there was no point in maintaining the claims to the right of exclusive navigation in those parts. 'The War of Jenkins' Ear (11) might have been featured by the slogan of 'Free Seas or War'.

IV. The greatest impulse to the development of the international law of territorial waters was derived from the naval wars of the eighteenth and nineteenth centuries. These wars raised acutely problems demanding the assistance of the new science of international law for their solution. The law so evolved was thus intimately related to a condition of belligerency and dealt especially with the particular problems thereof. The normal relation of States is peace. To bend the international law thus developed by belligerent agencies to meet the dissimilar peace time requirements of the family of States is one of the problems of today. Under conditions of peace development of law is slower than during war; there is not the same urgency or incentive to States to act. Nevertheless, because more deliberate, the decisions of States and agreements entered into during peace must command greater voluntary respect, the ideal 'sanction', and have a more lasting and greater influence upon other States, not necessarily parties to the conventions, than the hasty and not always unbiased decisions taken in the heat and passion/

---

(11) Butler and MacCoby. p.51.



passion of war.

V. As illustrating the factors arising from belligerency which have given substance and form to the international law affecting territorial waters, neutrality may be instanced. Formerly, neutrals were merely 'friends' with but faintly recognised rights and duties. Grotius, in his De Jure Belli ac Pacis, could exhaust them in one short chapter. (12) So important did the rights and duties of neutrals become that it may be said the international law, in its earliest stages, centred round this conception. The American States were largely responsible for the prominence given to neutrality. Removed from the maestrom of European strife, the United States, frequently neutrals, were at once the legislators and the tribunal on the laws of neutrality. These States at the beginning of the modern period, fresh from their rebellion, sought to find a philosophical basis in current political thought for their attitude of neutrality during the war between Britain and France. It was provided by the theory of a hypothetical freedom of the individual which formed the hypothesis of Rousseau's Social Contract and by the writings of Vattel. (13)

Founding on these the American States formulated and insisted upon the absolute impartiality of neutrals.. Franklin acknowledged his indebtedness to Vattel; Jefferson and his successors, exercising great influence in shaping the laws of neutrality/

---

(12) Bk. iii. Ch. XVII. (13) Droit de gens, III. Ch. VII.

neutrality, rediscovered the slogan of the "Freedom of the Seas", which had first arisen in another connection, and adopted it to justify their theory of neutral rights. If the 'freedom' of the individual remained unimpaired, the neutrality of the State could not be compromised by the act of the subject. This principle has been received into international law but not without some qualification. The factor of territoriality was early introduced into the American view of neutral obligations. At first no objection was taken to belligerents setting up prize courts in neutral territory. Later, it was forbidden. The arbitration consequent on the 'Alabama' incident has been accepted as settling that the acts of the individual on neutral territory may compromise the neutrality of the State if these acts can be construed as making use of the territory as a base for military operations. In the 'Alabama' incident, the ground of complaint was the fitting out of a vessel for belligerent purposes, an act which is scarcely distinguishable from permitted manufacture and sale of munitions of war which was done by the neutral United States for the Allies during the European War. The irritations to which the neutrals were subjected during the war of 1914-19 and the pursuit of the impossible ideal of isolation from European conflicts has led to a burst of American neutrality legislation in 1935 and 1937 and the coining of the impractical theories/

(14) Hall pp. 96 & 97. (15) Moore Digest vii. 's.1334.

(16) Appendix 19.

(17) For American view of neutrality and manufacture of arms during the war of 1914-19 and after see International Conciliation. 1928 p 364 et seq.

### III.

theories of "non-intervention" and "non-recognition". The United States have not progressed far towards a solution of the problem of the rights and duties of a neutral in a modern conflict.

VI. Scotland had gained nothing from the Dutch Wars. The growing Scottish industries found themselves without a market for the English Navigation Acts had closed the colonies against them: the Scottish Darien Scheme was promoted to offset these disadvantages and it failed. Innumerable other schemes were suggested by pamphleteers and the government adopted some remedies to alleviate the distress and to foster industry but none of these affected foreign relations. (18) Later, in Britain, the writings of Mill, Bentham and Adam Smith, reinforced by the adoption of Free Trade principles, reconciled British opinion to the abandonment of the former claims to maritime dominion. (19)

But to return to Scotland, of the Scottish claims that the fisheries within sight of the shore were reserved for the natives, only one mention has been found. In 1706 the Judge Admiral issued a Commission to John Adair, Geographer of Scotland, to seize and bring into port any foreign vessels fishing within sight of the shore. The purpose of this Commission at this late date is obscure and no satisfactory explanation can be suggested. It may have been intended to furnish a possible source of income for/

(18) Mitchell. Book III and bib. of contemporary literature in Scott and the Scottish History Society Vols. 14 & 15; also the following Acts, 1698 c.43. 1661. c.279. 1669 c.18. 1690. c.103. 1705. c.48. 1707 7 Anne c.7. ss 8 & 15.

(19) V.M.S. Crichton, B.Y.I.L. Vo. IX.

for Adair and, possibly, the Judge Admiral. The expenses and emoluments of Adair, at the time engaged upon a survey and publication of the maps of the coast, the salary of the judge of the Admiralty Court, and moieties to other parties were met from the proceeds of a tunnage levy upon shipping. Renewed in 1704 for a period of five years, the grant had never been sufficient for its purposes and was regarded as  
(20)  
burdensome. In 1705 the Committee of the Estates on the Public Accounts reported that the fund had fallen into such extraordinary confusion that they despaired of ever bringing it to account: Adair and other had been collecting the dues on their own account and the Committee granted them a commiss-  
(21)  
ion to continue to do so until July 20th, 1706. Six days after the commission expired the Judge Admiral issued his  
(22)  
commission to Adair. So far as can be ascertained from the extant records of the High Court of Admiralty and of the Admiralty Court of the Regality of St Andrews, no causes were before these Courts for the enforcement of the alleged 'law'. The Judge Admiral's Commission does not appear to have been noticed by any writer on the fisheries of Scotland or on the  
(23)  
life of Adair. The commission was perhaps issued upon a promise to make it effective but Adair, an excellent but dilatory craftsman, prone to overestimate his abilities of  
(24)  
performance, had neither the means nor the purpose to that end.

There/

(20) See complaint by merchants of Bo'ness in file of papers in H.M. General Register House, re Adair and Sleszer.

(21) Scots Statutes Vol. IX. 195, 203, 204; App. 49, 66, 77, & 78

(22) Appendix 11 (1)

(23) Bannatyne Miscellany Vol. II; Scottish Geographical Mag. Vol. XXXII. Feb. 1918 and 'Early Maps of Scotland'.

(24)/



There is no reference to it in his extant correspondence or in his Will. The authority for the commission by the Judge Admiral may have been the old pretence of the burghs that the fishing within the land kenning was reserved for the natives. The law as to the sea fisheries was certainly obscure. The Crown undoubtedly claimed the proprietary interest in mussel scapls and oyster beds and they were the subjects of grants to vassals, and the right of the Crown to the salmon fishing was, and is, well known. The dubiety was as to the white fishing. There was plausible grounds for the popular conception that the white fishings in the sea could be owned. The right of the public to fish in the seas for other than the royal fishes was recognised but prescriptive rights were not unknown and restrictions had been imposed. At least one burgh, Crail, had illegally extended the grant in its charter of 1584, of an assise of herring and tiend fish brought into the port, to cover all fish and lobsters taken between Arbroath and Dunbar, even when they were never brought into the port of Crail. The/

(24) Adair had to use hired boats for his survey and the dues under the levy on shipping would appear from his Will to have been collected like the customs at the ports. Commissariat Record of Edinburgh Vol. 87. 17th Dec. 1719. See also Appendix 11(2).

(25) Admiralty Decisions Vol. A. p.206; Vol. C. p. 84. Stewart. Ch. iv; Bell's Election Law p. 52; Bell's Princ. para. 646; Sea Fisheries Act, 1868, 31 & 32 Vic. c. 43.

(26) Rankine Ch. XV. As to the possible proprietary rights in herring and white fishing see Stair II.I.5 and Craig - Jus Feudale, I.15. 13. "Nam licet piscationes in mari non prohibeantur, tamen et haec praescribuntur et traduntur permissae ut prohibitae secundum consuetudinem."

The claim was judicially characterised as being 'very singular, anomalous, and of an unfavourable nature' having been acquiesced in through ignorance and it was repelled. In Bell's

Election Law no fewer than twentysix instances of infetment in white fishings are noted between 1639 and 1704 but the same writer offers a very reasonable explanation and reconciliation with the general conception of freedom of fishery in the open

sea. Shore stations may have been so convenient and extremely well adapted for particular fishings as to become in popular thought, so connected with the fishings that they were regarded as units. The rent paid for the shore facilities of curing then came to be regarded as a consideration for the right of fishing which, in fact, it was not. The point is illustrated by the opinion of Lord Medwyn in the Commissioners of Woods

and Forests v Gammell. There the early grant of tiend fish to the monks of the Isle of May was regarded as a precedent validating all subsequent grants of an apparently exclusive right of fishery in territorial waters. It is suggested that, had the opinion of the Admiralty Court in the case of the Burgh of Crail been brought to the notice of his Lordship, his opinion would have been more guarded. The question of the nature of the right of the subjects to take white fish from the territorial waters was raised but not decided in the later case of the Duchess of Sutherland v Watson. Whatever they may

(27) Connolly v Fishers of Crail, Admiralty Decisions  
Vol. C. p. 12. Oct. 1802.

✓(28) p. 52. ✓See Bell's Princ. s. 646

✓(29) 1851 13 D. 855 at p. 873. ✓

✓(30) 1868. 6 Macph. 199

have been, all restrictions and exactions from natives for the white fishings were abolished by the Act, 29Geo. II. c.23. As a matter of interest, none of the authorities cited above mentioned the old limit of land kenning but adopted, sometimes unequivocally, the three mile limit for territorial waters. There was, however, no limit of territorial waters mentioned in the opinions of the Admiralty Court on the subject of fisheries at that period nor in the early grants of fishery referred to by Lord Medwyn.

VII. The restriction of territorial waters generally to a narrow belt ex adverso of the territory of the State was confirmed in substantial measure by British naval exigencies during the Seven Years and Napoleonic Wars and the fishery disputes with the United States. The root principle of Pitt's policy during the former war was, firstly, to concentrate the fighting energy of the nation upon naval operations which would prevent the French sending aid to their colonies, and, secondly, to subsidise his allies by land. Even in former wars the predominance of the British navy had been manifest; that predominance was to be developed into overwhelming supremacy. Inevitably, the aggressive measures adopted by Britain irritated the neutral powers whose opposition found expression in the Armed Neutralities of the North and the insecurity of their rights was proved by the destruction of the Danish fleet in the neutral port of Copenhagen. For the time being Britain was virtually dictator on the seas. To fulfil its mission the

British navy required the fullest freedom for action: and admission of the former extensive claims to maritime dominion would have been inimical to<sup>the</sup> world's greatest naval power and must have been straightaway negatived. A favourable factor too was that the neutrals, in their declarations, after the Stuart declarations of neutrality in England, had sua sponte prohibited hostilities in their coastal waters. (31) It was only a matter of time until the same limits were adopted for 'reserved fishing'. Thus a modus vivendi was found which, in the restriction of territorial waters to a narrow belt of coastal waters, was consistent with the principles which were now being advanced by the more enlightened jurists. Expediency and reason overthrew the former claims to extensive maritime dominion.

VIII. Between the Napoleonic War and the European War of 1914-19 there was no maritime war of major importance. The American Civil War, the Spanish-American and the Russo-Japanese Wars, however, produced a crop of incidents touching territorial waters and thereby the international law was further developed. Inter-State arbitrations on the interpretations of treaties during the intervening periods assisted in the development, and the close of the European War afforded a convenient point for taking stock of the situation. It then appeared that the international law of territorial waters had been so far settled as to admit of codification. The Second Commission (Territorial Sea) of the Hague Conference for the Codification of International Law made very substantial progress on various heads but in many cases agreement was conditional on unanimity as to the



the width of territorial waters. On this point failure was registered and it must be held that for this reason the whole project of codification has failed. (32) It would appear that the

Commission desired to settle permanently the width of territorial waters for all coasts at three, six or twelve miles. Question may be asked, whether any of these limits could have adequately met the changing needs of the community of States. More preferable would have been a formula definite yet admitting a limit variable and suitable to the needs of all ages and all States or, at least, providing for the revision of the 'limit' in the light of agreed principles? (33) Bynkershoek's dictum, 'imperium terrae finitur, ubi finitur armorum vis' was definitive but elastic: the three mile limit, the eighteenth century application of the principle giving it a strange fixity, is a violation of the principle itself, is still strenuously advocated and vigorously opposed in the altered circumstances of the twentieth century. International Law as a dynamic force rarely admits of statement in specific terms as having reached finality in detail but must normally prefer expression in fundamental principles which, in their generality, are so equitable as to be accepted by States as binding. A specific extent of territorial waters of three, six or more miles in breadth will not meet with the approval of all States.

#### IX./

(32) League of Nations. Report of the Second Commission of the Conference for the Codification of International Law. C.230. M. 117, 1930. V.

(33) De Dominio Maris cap. ii.

IX. Nevertheless reasonable restriction of the claims to coastal waters is now so far settled that no counter proposal would be regarded seriously. Yet, as has been remarked, the shadows of a former greatness have sometimes been embarrassing. (34) In 1803 negotiations with the United States were broken off because Britain could not see the way clear to concede freedom from search upon the British Seas. Until 1805 the Admiralty Regulations contained the injunction to require the salute of the Vail in the British Seas. Hall surmises that, as no protests were lodged by foreign powers, the injunction could not have been observed. The abortive Russian Ukasse relating to the Behring Seas Fisheries attempted to resuscitate in 1821 the limit of 100 Italian miles as the limit for territorial waters suggested by the early Italian jurist, Bartolus. (35) Even as recently as 1914, the Privy Council had occasion to remark that Selden and Hale were no longer authorities on British maritime dominion and that the 'British Seas' did not in these times have the same connotation as in the eighteenth and nineteenth centuries. (36)

X The dictum of Hall as to the progress of international law generally is particularly appropriate to the special branch dealing with territorial waters.

"Looking back over the last couple of centuries we see international law at the close of each fifty years in a more solid position than that which it occupied at the beginning of the/

---

(34) Hall 185

(35) Parl. Papers U.S. No.1. 1893, British Case. 37, 135.

✓ (36) Attor. Gen. for British Columbia v Attor. Gen. for Canada  
[1914] A. C. 153

the period. Progressively it has taken firmer hold, it has extended its sphere of operation, it has ceased to trouble itself about trivial formalities, it has more and more dared (37) to grapple with the fundamental facts in the relation of States.."

But it would be idle to pretend that this progress has been unchecked. In regard to territorial waters, there have been marked changes: there may be changes in the near future but we surmise that the general framework will be unaltered. It is not now permissible to assert that because a particular bay was claimed to be a King's Chamber and therefore within the territory of the State in the seventeenth century, it must still be regarded as within the territorial waters of Great Britain. Historical precedent is still to an indefinite extent respected. The modern jurist enquires, however, the nature of the right claimed, whether it is admissible having regard to its purpose and the rights of other interested States, whether it meets the requirements of the modern world and whether it is consistent with the already accepted principles of international law. These are essential qualifications.

---

(37) Hall Preface to Third Edn. Quoted in In re Piracy  
 [1934] A. C. 586 at 592.

## CHAPTER II.

## The Sources and Evidence of the Modern International Law of Territorial Waters.

I. The scientific development of international law has been dated from the Grotian era but not until the French Revolutionary Wars do we find incontrovertible evidence in the conduct of States of the existence of a controlling body of rules relating to territorial waters, as now understood, which States felt themselves obliged to observe, and did commonly observe, in their relations with each other. The philosophical basis of international law had been previously laid by the jurists, of whom Grotius was the most illustrious. That period of belligerency was the first proof of the extent to which their doctrines were to receive the common assent of the Great Powers.

II. As several of the issues as to territorial waters, e.g., their extent, are disputed, it is necessary that the sources and evidence of the law should be determined. It is generally agreed that, in the absence of a superior legislative power, custom is the primary source of international law with possibly, as a secondary source, certain treaties of almost universal force accepted as declaratory of international law. Some writers/

(1) Moore Digest i.s.1; Westlake i.p.12; Walker i. ch.iii; Wheaton i. p.9; Oppenheim i.p.79; Holland, Studies in International Law, p.23, prefers Albericus Gentilis as the father of international law.

(2) Adapting Hall's definition of international law, p.1; Wheaton i. p.5; Moore Digest, i.s.1; West Rand Gold Mining Co. v. Rex. L.R. [1905] 2 K.B. 391 at 407.

(3) Pitt Cobbett i.6 & 7; Wheaton i.10; Hyde i.s.3 Holland



(4) writers, e.g., Moore, would add the writings of jurists, municipal law bearing upon international conduct, and the decisions of judicial tribunals, while Westlake would add 'reason' as extending the existing law with modifications to new cases and fresh situations. (6)

III. A custom, to have the force of law, must be a usage or course of conduct which all States acknowledge to be binding upon themselves in their relations inter se. It must be distinguished from mere usage, which States are free to follow or not as they think fit, for there is lacking the essential element of law. As Westlake put it, "Custom is not to be confounded with mere frequency or even habit of conduct... Custom is that line of conduct which the society has consented to regard as obligatory." (7) There may be competing usages and the fit-test may ultimately prevail and be appealed to in a dispute, though it may be not infrequently violated. Finally, it may be said to take the obligatory character of custom. Such is binding upon States: membership of the community of States necessarily/

Holland Jurisprudence Chap. V.1; Oppenheim 1.25 & 26. 18; West Rand Gold Mining Co. v Rex Cit. Sup. c.f. Hall pp. 7 - 12 for a criticism of the practice of stressing certain treaties as a source of international law. Also Corbett B.Y.I.L. Vol. VI for an examination of the sources and evidence of international law. Lorimer Bk.I.

(4) Digest i.s.1.

(5) International Law i. pp.14 & 15.

(6) "The function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find - exactly as in the mathematical sciences, - the solution of the problem."

Eastern Australasia and China Telegraph Co. Ltd. (1923)

Nilssen. p.75).

See also the opinion of Lord Alverstone C.J. in the West Rand Gold Mining Co. v Rex cit. sup. at p.402.

(7) International Law i. 14; (8) Pitt Cobbett i. p.5.

necessarily implies the acceptance of the obligations of international law whatever they be, and whether acceptable or otherwise to the particular State. (9)

IV. It is a matter of no inconsiderable difficulty to ascertain whether usage has ceased to be inchoate custom and has fully matured into law. The test usually applied is that the usage must have been approved by the concurrent sanction of civilised nations or the general consensus of public opinion within the limits of European civilisation. Formative factors are long continuous usage but more so the number of States adopting it. (10) (11) (12)

"Unanimous opinion of recent growth is a better foundation of law than long practice on the part of some only of the body of civilised States. But it must be remembered that as no nation is bound by the acts of other countries in matters which have not become expressly or tacitly a part of received international usage, the refusal of a single State to accept a change in the law prevents a modification agreed upon by all other States from being immediately compulsory, except as between themselves..... The acts of minor Powers may often indicate the direction which it would be well that progress should take, but they can never declare the actual law with so much authority as those done by the States (the Great Powers) to whom the moulding of the law has been committed by the force of irresistible circumstances." (13)

Much the same view is expressed by Pitt Cobbett.

"If the usage in question has become the predominant usage, and if, in fact, it prevails amongst the great majority of States, it is conceived that it may fairly be regarded as part/

✓ (9) Moore Digest i.s.l. (10) ✓ Do. i.s.l.

✓ (11) Westlake i. 16.

(12) See opinion of Gray J. in Paquette Habana (1900) 175 U.S. 677 at p.694. Also Westlake i. 17.

"Time cannot supply the want of general agreement."✓

(13) Hall pp.12 & 13.

part of international law, even although an exceptional practice may still be followed by a few States, especially if those be of minor importance." (14)

V. Whether a particular usage has been or has not been agreed (15)  
 to as law is thus a matter of evidence. The Permanent Court of International Justice, erected under the provisions of Article XIV of the Covenant of the League of Nations, for guidance with respect to international law and the relative weight to be attached to the various expressions of it, is to apply the order following:

(1) International conventions, whether general or particular establishing rules expressly recognised by the contesting States. (16)

(2) International custom as evidence of a general practice which is accepted as law.

(3) The general principles of law recognised by civilised nations:

(4) Judicial decisions and the teachings of the most highly qualified publicists of the various nations - as subsidiary means for the determination of the rules of law.

Having regard to the origin of the Court and the eminence of the panel of jurists who drafted the rules, these criteria for the evidence of international law must be received with profound respect.

## VI./

---

(14) Pitt Cobbett i.9.

(15) Reg. v Keyn (1876) 2 Ex.D. 63 per Lord Coleridge at p.154.  
The Zamora (1916) 4 Lloyds Prize Cases 62.

(16) "Though the law of nations be the general rule, yet it may, by mutual agreement between the two powers, be varied or departed from; and where there is an alteration or exception introduced by particular treaties, that is the law between the parties to the treaty; and the law of nations only governs so far as it is not derogated from by the Treaty". Report by Law Officers on the Silesian Loan Question. 1753. Marsden. ii. 353. ✓



VI. The first rule raises no difficulties other than those of interpretation of treaties between the parties and their application to the set of circumstances in the case before the Court.

VII. The second and third rules bristle with difficulties for they imply the ascertainment of custom, - the unwritten law. In their generality they enjoin resort to all those sources from which the evidence of international law is to be sought. (17)  
These have been enumerated by Westlake as follows:-

" The best evidence of the consent which makes international law is the practice of States appearing in their actions, in the treaties they conclude, and in the judgments of their prize and other Courts, so far as in all these ways they have proceeded on general principles and not with a view to particular circumstances, and so far as their actions and the judgments of their Courts have not been encountered by resistance or protest from other States. Even protest and resistance may be too feeble to prevent general consent being concluded from a widely extended practice...

Special authority is often claimed for the practice of States which are most concerned with a particular branch of international law, as for that of the chief maritime powers with regard to the laws of maritime wars." (18)

By themselves rules (2) and (3) afford but little in the way of exact guidance on any point not covered by settled law. Rule (3) requires more consideration. It rests upon the hypothesis, no longer doubted, that there is a philosophical basis or set of principles to which international law conforms - not upon/

---

(17) International Law i. 16.

(18) See also the Scotia (1871) 14 Wall. 170 referred to in Moore Digest, i. s.1; Wheaton i. pp. 16 & 17; Balfour's Practicks - Sea Laws incorporating the French Ordinances of the 16th century into the Law of Scotland. Sir M. Gwyer (British delegate) at the Conference for the Codification of International Law of Territorial Waters. League of Nations cit. sup. Acts Vol. III, pp 140, 141.



upon the thesis that there is a body of law common to all systems of municipal law. A few States cannot create obligations for the whole world. (19) The Court is not, however, expressly prohibited from considering municipal law, if, apart from its origin, it can be held to be pertinent to the issue and if its inherent principle has received the commendation of States generally. The essence of the difficulty in the application of rules (2) and (3) is that international custom and general principles of law recognised by civilised States are matters of evidence. The evidence, in the absence of express acknowledgment to be bound, can only be deduced from a consideration of acts of state and the 'subsidiary means for the determination of the rules of law', viz., judicial decisions and the teaching of publicists.

VIII. There rises at once the question of the weight to be attached to each of the items of evidence and the sufficiency of the whole. Deliberate acts of state, including treaties, municipal laws, ordinances and instructions to agents of the state, and declarations of responsible officials, if purporting to be in conformity with international law, may be accepted as declaratory of the national view of the law applicable to the specific issue. That national view may be assented to by other States as a correct interpretation of international law. States, however, cannot be held to be bound because they have/

---

(19) Moore, Digest i.s.l.

have remained silent and have made no immediate protest. In every case the circumstances attending the act of state must be considered, e.g. whether it purported to apply a rule of international law. In the case of judicial tribunals, the standing of the Court, its composition, the source of its jurisdiction and any restrictions imposed thereon must be kept in mind when assessing the value of the decisions. The judgment must be impartial and within the terms of the reference. As a rule, the opinions of international tribunals, such as the Permanent Court of International Justice, will be received with greater respect than those of a national Court. It would appear that, with the British and American Courts and jurists accustomed to regard precedent as binding, greater weight is to be attached to decisions of tribunals than to the opinions of recognised publicists. National Courts, being creatures of national law whose functions depend upon national law, can only express the national view and whether that view is in conformity with the true international law can be determined only by the methods applicable to every other principle of international law. In as much as international law is a matter of evidence in the Courts and as foreign relations are within the province of/

(20) In the remit to the arbitration panel the parties may state the rule they desire to have applied, e.g., in the Alabama; See Appendix 19; Wheaton 1.20; Hall 193; Lorimer Bk. 1., Ch. IV.

(21) Wheaton 1.12.

(22) Professor Brierly, Law Quarterly Review, Jan. 1935;

Mortensen v Peters (1906) 8 F.(J) 93 at 101.

L. Justice General Macdonald: "It is a trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal can be made. International law, so far as this Court is concerned, is the body of doctrine regarding the international/

of the executive, it may sometimes happen that the Court is misled by a bias to national policy and expediency being introduced into the evidence placed before it by the executive and (24) the final decision is therefore not free from taint. Occasionally municipal Courts have been drawn into discussing rules of international law where the issue and the decision did not extend beyond municipal law. In such instances, however enlightened the remarks may be, they command the respect due to obiter dicta (25) only.

IX. Prize Courts, essentially municipal Courts whose decisions are dependent upon municipal legal sanctions, frequently declare that they administer international law. The American prize courts early proclaimed their allegiance to the English prize law (26) and would appear to profess to administer international law. (27) They are, however, bound by municipal law. (28)

The British prize courts, from the definite opinion of Lord Stowell in The Maria down through a series of decisions extending to the present time, have professed that the substantive/ (29) (30)

---

international rights and duties of States which has been adopted and made part of the Law of Scotland."

(23) Reg. v Keyn cit. sup. at p.154

The Zamora 1916. IV Lloyd's P.C. p. 62.

(24) See The Fagernes [1927] P.(C.A) 311;

The executive may intervene after the decision and render the judgment null as in the case of Mortensen v Peters (1906) 8 F.(J) 93; Arantzazu Mendi. 54 T.L.R. 981.

(25) Instances of this are to be found in Reg. v Keyn and Mortensen etc. cit sup., Lord Advocate v Clyde Navigation Trs. (1891) 19 K. 174. and Lord Advocate v Wemyss' Trs. 2 F.(H.L.) 1.

(26) Thirty Hogsheads of Sugar v Boyle 9 Cranch 191

(27) The Nereide 9 Cranch 388, 423; The Scotia (1871) 14 Wall. 170, 187 referred to in Moore Digest s.1.

(28) The Amy Warwick (1852) 2 Black 635; Cunard Steamship Coy. v. Mellon (1923) 262 U.S. 100.

substantive law administered by them is international law. This  
 (31)  
 view was endorsed by the Government in 1916. The ordinary  
 Courts in Britain hold themselves to be bound by municipal law  
 where there is a statutory enactment, and that considerations  
 (32)  
 of international law are, in those cases, irrelevant. A similar  
 view was expressed by the British Foreign Office as to  
 (33)  
 Prize Courts and was definitely accepted by the Privy Council  
 (34)  
 in two recent cases, the Zamora and the Bathori.

X. The shackles of municipal law upon the British and American  
 prize courts are, however, of the lightest. Dictation from  
 the Sovereign is largely as to procedure, the substantive law  
 being drawn from international law. The commission issued to  
 the prize court prior to the Naval Prize Act, 1864 followed a  
 stereotyped form very closely, - 'to proceed upon all manner  
 of captures..... according to the course of Admiralty and the  
 (35)  
 Law of Nations.'

Continental prize courts take a different view as to the  
 law they are to administer, and as to their functions. The  
 German courts hold that they are required merely to pronounce  
 whether the capture was legal within the terms of the municipal  
 ordinance/

(29) (1799) 1 C. Rob. 340 at 349(a).

(30) The Recovery (1807) 6 C. Rob. 341 at 348.

The Fox (1811) Edward 311; The Marie Glaeser 1 Lloyd P.C. 56;  
The Odessa 1. ib. 301 at 326; The Zamora IV ib. 62 at 91.

(31) Parl. Papers. Miscell. No. 14. (1916) p. 16 (Cmd. 8233)  
 adopting Lord Stowell's view in The Fox.

(32) Reg. v. Keyn. cit. sup.; Mortensen v Peters, cit. sup.

(33) Parl. Papers. cit. sup. and Chung Chi v The King. 1938. T.L.R.

(34) The Zamora cit. sup.; The Bathori [1934] A.C. 91.

(35) Quoted in The Zamora cit. sup. at p. 88.



ordinance and instructions, but Gardner points out that, in the result, the difference is merely in emphasis and not in substance. The French courts during the European War were less rigorous in their application of the municipal law where the international law was more favourable to the neutral. The Belgian courts appear to have considered that international law overrode municipal law. (36) Thus there is a series of national courts all dealing somewhat differently with similar subjects in international law, using different methods and giving varying emphasis to the sources and to the evidence of the law applicable to each case.

XI. There cannot be any doubt, however, that, if occasion arises, a national court such as a prize court, may, by eminent judicial fairness as between neutral and belligerent and by close conformity to the rules of international law as already established, give clearer definition to that which is in doubt and their decision may be homologated in time by the conduct of states similarly circumstanced. It was thus with the judgments of Lord Stowell whose opinions were received with the greatest respect by other tribunals, especially those of the English-speaking nations, and by writers on international law of other countries. (37)

"If the talents and celebrity of Lord Mansfield have contributed to raise the Common Law Courts in public estimation have/

---

(36) Gardner ss. 126-138; see also Sir Erle Richards in B.Y.I.L. (1920-21).

(37) See Bell Commentaries III.IV intro. For modern appraisal, see Sir Erle Richards cit. sup.; Moore Arbitrations vol. IV. p.31; Lauterpacht, B.Y.I.L. 1929.p.65

have not the celebrated judgments of Lord Stowell, the Judge of the English High Court of Admiralty, reflected the highest honour on that Court in England as well as in other countries?" (38)

On the whole it may be safely affirmed that there has been no radical change since the position was summarised by an American Court in 1815. (39)

"The decisions of the Court of every country, so far as they are founded upon a law common to every country, will be received, not as authority, but with every respect. The decisions of the Courts of every country show how the law of nations, in a given case, is understood in that country, and will be considered in adopting the rule which is to prevail in this."

XII. The Scottish Admiralty Court was happily circumstanced in its closing years for dispensing international law. It was in no way trammelled by municipal law. It was not only a court of prize, it also included within its jurisdiction all causes arising from mercantile adventures. Further, there being a deficiency in the Institutional Works as to this branch of the law, the Court had to resort to the great body of law which formed a jus gentium mercatoriumque, the ancient maritime codes of the Mediterranean and the codes of the western nations. The Scottish Court of Admiralty reached the peak of its efficiency under Judge Admiral Gay (contemporary of Lord Stowell) of whom Bell has said, (40)

"He directed his particular attention to the reformation of/

---

(38) Law Tract, Report by the Faculty of Procurators before the Scottish Admiralty Court. at p.22.

(39) Thirty Hogsheads of Sugar v Boyle. 9 Cranch 191 at 196.

(40) The prize jurisdiction was abolished by 6 Geo. IV. c.120 s.57 and the other jurisdictions transferred to the Court of Session by I Will. IV. c.69. See also p.105.

(41) See Ch. 1 page 104 and Bell Comm. III. IV. Intro.  
Balfour's Practicks - Sea Laws

of the Court during the few years he sat there, and had he survived, would have succeeded in greatly augmenting its importance and usefulness. He bestowed exemplary care in deliberating on the cases which came before him, and above all, seems ever to have had in his mind that most salutary of all judicial maxims, to preserve, as far as just principle would permit, uniform consistency, not only with former determinations in his own Court and in the Court of Session, but with those of England and other European States". (42).

An indirect tribute to the efficiency of the Court was (43)  
the paucity of appeals to the Court of Session. Unfortunately, as the decisions remained unpublished the Scottish Admiralty Court could not influence the development of international (44)  
law beyond the immediate jurisdiction of the Court.

XIII There remain to be discussed the writings of jurists as affording evidence of the rules of international law. As already mentioned, greater weight is accorded these in countries which do not regard themselves as thirled to precedent. Chancellor Kent, founding on the opinion of Lord Mansfield in (45)  
Triquet v Bath, has stated the American view as follows:

"In the absence of higher and more authoritative sanctions, the ordinances of foreign States, the opinions of eminent statesmen, and the writings of distinguished jurists are regarded as of great consideration in questions not settled by conventional law. In cases where the principal jurists agree the presumption/

---

(42) Bell Commentaries III.IV. Intro. Note 2 on p.547 (7th edn.) The eulogy there is fully borne out by a study of the Judge Admiral's notes - See Admiralty Decisions

(43) See Law Tract at p.20

(44) See Bib. under MSS in National and University Libraries for series of collections of notes of decisions. Morrison's Dictionary (printed 1801) and 'MSS Abbreviate in Faculty Library' appear to have been the chief works of reference for previous decisions.

(45) 3 Burrows 1478

presumption will be very great in favour of the solidity of their maxims; and no civilised nation that does not arrogantly set all ordinary law and justice at defiance will venture to disregard the uniform sense of the established writers on international law." (46)

But these works, however, are not resorted to for the speculations of the author concerning what the law ought to be (47) but for trustworthy evidence of what the law really is. The view of the British Courts is that a consensus of opinions of jurists is not binding upon the Court but is evidence of the (48) agreement of nations. From this it is recognised that publicists perform the further function of building up a consensus of opinion by which the range of international law is increased. In this respect they cannot be regarded as recording international law. (49)

XIV. Hence it may be concluded that, before a rule or principle can be advanced as a rule of international law, it must be shown to be a rule of conduct which the States regard as obligatory. Where such a test fails it must be considered whether there is a sufficient consensus of opinion amongst the States as to lead to an inevitable conclusion that the rule must be regarded as obligatory upon all. Treaties and conventions, being binding only upon the parties to them, should not be extended to others who have refrained from assenting to them until/

(46) Commentaries I.18. Adopted by Gray J. in The Paquete Habana (1900) 175 U.S. 677 at p. 701

(47) Hilton v Guyot 159 U.S. 113. quoted in the Paquete Habana cit. sup. at p.700.

(48) Reg. v Keyn. cit sup. per Lord Coleridge at p.154.

(49) West Rand Gold Mining Co. v Rex cit. sup. at p.402. Lorimer Bk.1 p.57 took rather a despondent view of the power of jurists to develop law but allowed that they could mould public opinion (p.87)



until it is clearly shown that the principle underlying the treaty provisions has been accepted into the corpus of international as applicable to all States. In assessing the evidence of international law, each item must be examined as to its origin and particularly as to whether it has been approved by the Powers generally. In selecting the items from which evidence may be deduced, it is sufficient that they be acts of state, of the executive or the judicial organs, or that they be pronouncements of parties specially qualified to speak to the subject; it is pre~~em~~inently necessary that the weight to be accorded to the evidence and the sufficiency thereof be carefully considered.

XV. While this essay is concerned primarily with the international law relating to the coastal waters of Scotland, that law is to be sought, not only in the acts of state of Britain and declarations of British policy, but also in the conduct of States in regard to coastal waters throughout the world. International Law is too universal to be viewed from any one  
(50)  
national standpoint.

---

(50) Moore Digest Preface. p.iv.

## CHAPTER III.

## The Juridical Status of the Territorial Waters.

I. Four principal categories of waters require to be distinguished; (a) inland waters lying within the ordinarily accepted frontiers of the country, (b) territorial seas, lying between the inland waters or the shore and the high seas, (c) an adjacent or contiguous zone on the high sea, and (d) the high sea itself. <sup>(1)</sup> The first category comprehends inland waters, ports, harbours and roadsteads which are admitted to be within the territory of the State and international waterways covered by conventions. These are outwith the scope of this essay; the high sea is also excluded. Whether categories (b) and (c) or category (b) alone constitute the territorial waters proper of the State is a matter for consideration.

The term "territorial sea" was preferred to "territorial waters" by the Second Commission of the Conference for the Codification of International Law held at the Hague in 1930 under the aegis of the League of Nations. "Territorial Waters" was the term employed by the committee of experts in the basis of discussion, has been sanctioned by use in such international conventions as that of the Hague Convention, Xo.XIII of 1907 relating to the rights and duties of neutrals and in the Air Navigation Convention of Paris of 1919, and is/

---

(1) League of Nations, C. 351(b)M.145(b) 1930 V.  
(Minutes of the Second Commission of the Conference for the Codification of International Law).

is the term usually employed by English writers. The term "territorial sea" is to be understood as including not only the marginal, adjacent, or coastal sea but also the gulfs and estuaries such as the Scottish firths. If inland waters and the high sea be excluded from the term, no misconception will arise.  
(2)

II. No definition of the juridical status of territorial waters has met with universal approval. There is substantial agreement, however, as to the rights exercised by, and the duties imposed upon States in respect to these waters: the differences of opinion as to the underlying legal principles are due in the main to the methods of approach and emphasis.  
(3)

While Ortolan has remarked, "Aujourd'hui les discussions sur le domaine et sur l'empire des mers .... sont reléguées dans le pur domaine de l'histoire," we find the debate continued in the twentieth century as to whether the territorial sea can be appropriated, the argument introducing such points as the fluidity of the waters, the exhaustibility or otherwise of the fructus, the lack of a natural boundary if the territorial sea is considered part of the territory of the State, and whether the high sea is res communis or res nullius - familiar subjects with Welwod, Craig, Selden and Grotius. Yet  
(4)

---

(2) "National Waters" has been used as synonymous with "inland waters" and "territorial waters" and is therefore not used here. See Hurst B.Y.I.L. (1922-23).

(3) Vol. i. p.137.

(4) Fauchille i.2. 127 et seq.; Lapradelle Lects. 18 & 19.

*Harvard Record - paper term "marginal sea."*

the 'Battle of the Books' is so far over that there are<sup>now</sup>/only skirmishes between outposts. States are but little influenced in their policy by such considerations, yet the question is so far unsettled in some respects that the Judicial Committee of the Privy Council in 1914, despite the trend of municipal legislation, decisions of municipal courts and the efforts of publicists, declined to express any views as to whether the sub-soil of territorial waters was the property of the territorial sovereign.<sup>(5)</sup>

III. It is unanimously agreed that the State, when exercising a jurisdiction upon territorial waters, is acting in a sovereign capacity; but it has been denied that the rights so exercised constitute sovereignty in the sense of the plenitude of the sovereign rights of a State. Restrictions upon that sovereignty must be admitted, not the least being that flowing from the right of innocent navigation vested in foreign merchantmen. Accordingly, the sovereignty has been described as imperfect, incomplete, attenuated or diminished.<sup>(6)</sup>

IV. Lapradelle, and to some extent Fauchille, takes the extreme view that the coastal State has only a bundle of servitudes - "un faisceau des servitudes" or "un ensemble des droits".<sup>(7)</sup>

(5) A.Gen. for Canada v A.G. for British Columbia  
1914/ A.C. 153.

The Conference for the Codification of International Law of Territorial Waters considered there was not much authority for the proposition but accepted it.

(6) C.f. discussion of Second Commission of the Conference  
cit. sup.

(7) R.D.I.P. vol.v. 214 et seq. & 309 et seq. See also Rolin  
3. p. 202.



(8) droits". He takes for his premises that the Territorial sea (9) is not physically or juridically a distinct entity; it is (10) merely part of the main ocean. The physical nature of the territorial waters requires no discussion; they form part of the main sea, but it is important that mariners and other who have occasion to use the coastal waters can, with exactitude, ascertain their position relative to the coast. Their rights and duties are thereby determined, e.g., whether they may fish there or not, according to whether they are upon the high sea or in territorial waters. States are vitally concerned in the protection of their rights between which and the fluidity of the waters there is no necessary relationship. The jurisdiction of the coastal State is not avoided by the physical nature of its territory, air, land or water. Lapradelle must take as part of his premises that the high sea is res communis. With him the right of navigation upon the whole ocean, including the other uses of the sea are paramount. Nevertheless, the interests of the coastal States and the practice of nations cannot be ignored; therefore he must admit these rights as a bundle of servitudes in favour of the competing interests of the littoral State.

V. /

- 
- (8) Les Principes etc. lect. 18 & 19.  
 (9) Do. Lect. 19 at p.5. "La mer territoriale n'est pas une entité distincte, ni au point de vue physique ni au point de vue juridique."  
 (10) Do. at p. 8 & 9. "C'est une partie de l'ensemble de la mer sur laquelle s'exercent des droits qui sont des droits particuliers - une responsabilité d'Etat."

V. Publicists are divided on the validity of the doctrine of servitudes in international law and those who accept it do not agree as to what does constitute a servitude. Oppenheim, Mcwair, Hyde, Stowell and Shucking accept the doctrine but Hall and Pitt Cobbett condemn it with faint praise. It is at this point that Pauchille parts company with Lapradelle; and Pearce Higgins, in his edition of Hall's work, notes the tendency to drop the doctrine from international law. List and De Louter reject the doctrine.

VI. For tests of a servitude, Hyde, founding on the opinion of the Arbitration Tribunal in connection with the North Atlantic Fisheries, suggests (a) that there should ~~not~~ be permanence in the sense that the right should not be dependent upon the continuance of the same sovereign régime, and (b) that the grant should be of a sovereign right and not merely a grant for economic or other advantage of like nature. Hall considered the right of innocent navigation, which all States possess over territorial waters, the most important remaining servitude in international law. Yet Pitt Cobbett and Oppenheim draw the distinction between these rights which arise from express or conventional grant and those which accrue from the law of nations as natural and inherent: the latter they do not regard as servitudes. Thus Hall's most important servitude is/

(11) I. 418 - 426. (12) B.V.I.L. Vol. VI. (13) ibid. ss. 152 & 153.

(14) p. 59. (15) His dissenting opinion in the Wimbledon case before the Permanent Court of International Justice was based on the doctrine of servitudes.

(16) p. 203. (17) i. 114. (18) Oppenheim i. 419.

(19) Hall. Note p. 204.

(20) See works cit. sup. for reference on the points mentioned here.

is not regarded as such by these writers.

VII. The decision of international arbitration tribunals appear to depend upon there being an express grant of a servitude<sup>(21)</sup> but, in the case of the S.S. Wimbledon, the Hague Tribunal, in the majority opinion, considered that it was immaterial whether Germany had by Art. 380 of the Treaty of Versailles granted a servitude. It was clear, in their opinion, that a right had been conferred upon all States.<sup>(21a)</sup> The most authoritative, but not exhaustive, opinion is that of the Hague Permanent Court of Arbitration in regard to the North Atlantic Fisheries. In this instance, after the case for the acceptance of the doctrine of servitudes had been most ably presented by the American advocates and denied by the British, the Court rejected the idea mainly upon three grounds: (a) that a servitude in international law predicated an express grant of a sovereign right; (b) the doctrine of servitudes originated in the obsolete conditions prevailing in the Holy Roman Empire; and (c) that, being ill suited to the principle of sovereignty which prevails in States under a constitutional government and to the present international relations of sovereign States, it had found little support among publicists.

VIII. Coastal States do exercise certain sovereign rights, e.g., legislation, regulation and control of shipping in the territorial waters/

(21) See summary by McNair. op. cit.<sup>(12)</sup> and also, generally, Reid

(21a) Publications de la Cour Permanente de Justice Internationale, Série A. Recueil des Arrêts, No.1.

(22) pp.10 & 11 (1910) Cmd. 5396. Oppenheim considers that publicists will not be unduly influenced by the opinion. I. 420.

but these are not servitude rights.

The first objection to the theory of servitudes is that it ignores the historical development of the rights of States in maritime waters. Navigation, particularly in the coastal belt, was formerly strictly controlled and it is only within modern times that the freedom of navigation has been universally admitted. It is not the littoral State which has obtained a prescriptive right, but the community of maritime States.

The second objection is that to segregate States into dominant and servient groups is repugnant to the modern concept of sovereignty. The theory of servitudes is unnecessary; it is inadequate. International law imposes duties upon States as to the waters under their dominion, which duties may be enforced by the sanctions of international law. To overcome the difficulty, Lapradelle adjoins a supplementary theory of the mutual responsibility of the States to undertake these duties. <sup>(23)</sup> Obviously we are departing from the doctrine of servitudes.

The third objection to Lapradelle's theory is that merely to list the rights actually exercised by a coastal State over the adjacent waters does not advance any juridical principle to which the present or future alleged rights may be required to conform. In the absence of such a principle; the legality of a course of conduct cannot be proved or disproved.

IX. The 'systeme du droit de conservation' favoured by

Fauchille <sup>(24)</sup>/

---

(23) Lapradelle Lect. 19. (24) i.2.147. et seq.



Fauchille is similar to Lapradelle's theory in that it premises the territorial sea to be part of the main sea - 'la mer libre'. It rests upon the sound proposition that self preservation is a fundamental right of States. A State is authorised to take all measures destined to assure its existence, and to defend itself against all acts which might diminish or harm any of its essential elements, viz., its territory, its population and its material resources. While these rights cannot be exercised upon the territory of another State, as such exercise might in turn impinge upon the fundamental rights of that State, they can be exercised upon the sea which belongs to none. It is admitted that this system or theory is less extensive than that of sovereignty and territory which is to be discussed later, but it certainly goes far to explain the justification and purpose of the rights of the coastal State over its territorial waters. Many of the present rules of international law can be shown to conform to the theory. The theory suggest a plausible reason why ships of war driven by enemies into territorial waters are not disarmed, viz., they cannot be regarded as having entered the territory of the neutral State. It is argued that, if the territorial waters do form a portion of the territory of the neutral, on the analogy of land forces, belligerent vessels should be immediately disarmed. But it is suggested that the genesis of this grant of asylum is founded in history dating from at least the sixteenth and seventeenth centuries and is now/

---

(25) See Proclamation by James I, 1605. Marsden i. 356-8. Balfour's Practicks Sea Laws, c.118.(1524). Also Treaties of Peace with Sweden (1654) Append.12 and with Denmark(1660-1) Appendix 13.

now sanctioned by the usage of even those states who claim that territorial waters do, in fact, form part of the national territory. Further, a belligerent vessel may enter the port of a neutral Power, admittedly within the territory of the neutral, and there remain for restricted periods, without being liable to be disarmed. If Fauchille's theory is carried out to its conclusion this result would not be possible.

X. The prohibition of belligerent acts in the territorial waters of a neutral power, according to the theory of the right of preservation, is a matter of defence of the interests of the coastal State, e.g. to prevent material damage to the inhabitants. Consequently, it is held incorrect to speak of these territorial waters as 'neutral waters'. Yet this conclusion, if adopted, would jettison that very useful concept of neutrality which States have come to regard as a rule of law. It follows from the theory, if rigorously applied, that, since it is only the defence of the neutral territory which is involved, the neutral State alone can have a locus standi to object to acts compromising its neutrality. This cannot be reconciled, however, with the duty imposed by international law upon <sup>the</sup> neutral to prevent such acts, for in the event of the neutral failing in the duty, the aggrieved State may itself may, as an interested party, intervene and apply the sanctions permitted by international law.

XI. A further difficulty emerges in fitting the theory to the scheme of things as they exist. Many of the principal maritime States/

States of Europe and America recognise and uphold a narrow limit of waters, called by them 'territorial waters', as sacrosanct for the purposes of neutrality and the exclusive right of fishing. They have further provision for their executive government extending their jurisdiction over a wider belt to (26) prevent infringement of their fiscal, sanitary and other laws. To cite one example, the natives are precluded by municipal legislation from trawling in the Moray Firth: foreign fishermen are not subjected to a restriction of the like extent; the latter may fish outside the three mile limit measured from the 'treaty' base line, i.e., where the entrance to the bay first narrows to ten miles. The executive, by their action following on the Court's decision in Mortensen v Peters and by their declarations in the House of Commons, showed that the Government considered they did not have power in international law (27) to exclude the foreign fishermen from the whole of the Firth. If the theory of the right of 'conservation' had been applicable, the exclusion of the foreigner would have been competent, since the object of the legislation was to protect the national and, indirectly, the North Sea fisheries. For these reasons the theory of 'droit de conservation' must be rejected as inadequate.

XII. The two theories stated above start from the premises that the territorial waters partake of the same juridical status/

---

(26) See "Contiguous Zone" post. p. 159

(27) See Chap. IV. Sect. B.

status as the high seas and, therefore cannot be appropriated by the coastal State as part of its territory or as under its sovereignty. These views ignore, indeed they are contrary to, the historical development of the law relating to territorial waters. As already indicated in Part I of this essay, States were urged by the prospect of economic advantage to claim parts of the seas or to assert a control over them. As that control was in many cases unreal, burdensome to the State without compensating advantage and irksome to strangers, States generally came to restrict their claims to meet the needs of the community of maritime States and their own immediate and (28) reasonable necessity. Such moderate claims were never denied by the most ardent advocates of Mare Liberum. As Hall has (29) remarked, "The true key to the development of the law is to be sought in the principle that maritime occupation must be (30) effective to be valid". Bynkershoek held that the sea, having no boundary, could not be possessed merely by intent without actual possession and suggested that generally the control ceases where the power of weapons ends. Until the recent emergence of the school of thought of which Lapradelle and Fauchille are the leading representatives, the juridical status of the territorial waters was viewed almost entirely from the angle of the coastal State and how far it could effectively appropriate an extent of waters.

### XIII./

(28) See Chap. IV. (29) p. 189.

(30) De Dominio etc. pp. 362 & 364.



XIII. Other opinions which have received considerable support from writers on the juridical status of the territorial waters are (a) that they are under the sovereignty of the coastal State or that the State has a right of sovereignty: (b) that the State has a right of property or that the territorial waters form part of its territory or (c) that the State has merely a right of jurisdiction thereon. These terms when applied to territorial waters have been regarded as analogous; <sup>(31)</sup> there is general agreement as to the essential nature of the group of rights which they connote.

XIV. If, as has been suggested, States sought to appropriate the seas for the purpose of economic advantage, the term "property" would appear to have the sanction of history. It was the basis of the Scottish claims to the reservation of the fisheries, supported by Welwod, Craig and the Scottish Estates. The theory was given prominence by Valin in his Commentary on the French Marine Ordinance of 1681, <sup>(32)</sup> and by Vattel, <sup>(33)</sup> and has <sup>(34)</sup> been unequivocally accepted by Hall.

In favour of this theory, it has been pointed out that the territorial belt could be dominated from the land by artillery or by an oversight from the land, thus giving the State a possessory title to the waters ex adverso of the shore. The extended range of artillery no longer bears any relation to the restricted territorial waters and the ratio has long since ceased.

---

(31) League of Nations C. 351 (b) M.145(b) 1930 V.p.37

(32) Sur la pêche.

(33) Bk.i. ch. xxiii.287. His theory is based on a supposed original plentitude but with an increased population and relative scarcity ownership had to be introduced.

(34)/

ceased to hold. The theory of state proprietary rights gives adequate support to the modern claims of States to reserve for their nationals the coastal fisheries and justifies the municipal law thereon. (35) In this de facto universal reservation of coastal fisheries for nationals there is at once the evidence of the motive, the intention and the will to treat territorial waters as 'property'. So close is the relationship that the territorial waters have been described as an appurtenance (36) or accessory of the land. So much are the territorial waters an accessory of the land that they cannot be alienated separately from the coast.

XV. Various objections have been taken to the theory of the right of property, but many of them, e.g., the "eight heads" of Fauchille, could be levelled against the theory that the territorial waters form part of the territory of the State. Indeed it is not always clear that a distinction between 'property' and 'territory' is intended. These objections will be considered in connection with the theory of 'territorial sovereignty'. (37) Lapradelle, in support of his theory that the territorial sea cannot be appropriated, takes his stand on the ground that the physical character of the sea precludes the sovereign from granting/

(34) P.190 et seq. Fauchille (i.2.133) contains a list of publicists who subscribe to the doctrine but Fiore mentioned therein rejects the doctrine - see para. 276. Oppenheim (i.357) may be added to the list.

(35) Scots Law - Erskine Instit. II.1.6. Bell's Principles. para. 639. Rankine Ch.XV; British view generally - see Sir J. Salmond Law Quarterly Review. Vol.xxxiv (1918) p. 235; For American view, see Moore ii. s.145.

(36) Hyde i.s.141. Fauchille I.2.p.133.

(37) I.2.p.134. (38) Les Principes Lect. 19.  
see para. 164 infra.

granting a right of property to an individual. Therefore, he contends, there being no right of individual property, the Sovereign cannot possess a right of property in the thing. This conclusion is not necessarily valid. To cite one example from the municipal law of Scotland, the Sovereign is considered to be vested in a right of property in the Regalia Maiora but he cannot alienate or grant a proprietary right therein to an individual. The Court of Session in Lord Advocate v Clyde Navigation Trustees (39) decided that the Crown had a proprietary right in the bed of the landlocked and other bays inter fauces terrae and that the public had merely the right of navigation and fishing. As to whether a similar right exists in the territorial waters along the open coast has never been expressly decided although there are dicta to that effect, e.g., in (40) Cunningham v Assessor for Ayrshire, sometimes founding upon the case of Lord Advocate etc. cit. sup. although the Lord Ordinary there explicitly stated that that point was not in issue.

(41)

Again the case of Lord Advocate v Wemyss Trustees, where the issue was in regard to coal seams under the Firth of Forth, not under the open sea, Lord Watson stated that he knew of no principle in the law of Scotland which would prevent the Crown from granting a lease to work the minerals under the territorial waters, a right by occupation in international law. There is no lack of evidence of grants by the Crown to vassals of exclusive property in mussel and oyster beds /

---

(39). (1891) 19 R. 174. ✓(40) (1895) 22 R. 596.

✓(41) 2 F.(H.L.) 1.

(142)  
 beds, but, as already mentioned, there was dubiety as to the  
 right of exclusive fishing, apart from salmon fishing. (43) What-  
 ever the common law may have been, all restrictions on the  
 right were removed and exactions forbidden by the Act, 29 Geo.  
 II.c.23. The fishings referred to in the Act were the white  
 fishings "in all and every part of the seas, channels, bays,  
 firths, lochs, rivers, or other waters where such fish are to  
 be found, on the coasts of that part of Britain called Scot-  
 lnad, and Orkney, Shetland and all other islands belonging to  
 that part of Great Britain called Scotland. " All were freed  
 from restriction, "any law, statute or custom to the contrary  
 notwithstanding." While the above opinions of the Courts were  
 but obiter dicta as to international law, the legislation  
 indubitably asserts a proprietary right of disposal.

But we should not be content with only the municipal law of  
 Scotland, even if in point, as proof of a principle of inter-  
 national law; in this instance the dicta and the legislation  
 mentioned are consistent with the opinions of the jurists and  
 the recognised practice of States. Lawrence says the rules of  
 International law on the reservation of the fisheries within  
 the territorial waters are simplicity itself. (44) Within the  
 territorial waters the subjects of the littoral State have the  
 exclusive right of fishing except where the State has expressly  
 or tacitly admitted foreigners to that privilege. The difficult-  
 ies/

(42) Lord Roystoun v Oyster Dredgers of Newhaven: Decrees of  
Admiralty Court Vol. 22. p.75; Connolly v Fishers of Crail  
ADMIRALTY Decisions Vol. 6 p.12; Mags. of Edinburgh. v  
Kay 1866. Vol. C. p.84.

(43)/



difficulties are introduced by conventions and the lack of a universally accepted limit of territorial waters. Outside these waters all men may fish without permission of any adjacent State.

There is probably no more settled rule in international law than this exclusive right to the products of territorial waters. States are reluctant to part with it and not infrequently reserve it in treaties. (45) Similarly, since Vattel's work was accepted as authoritative, (46) no one has challenged or would challenge the right of the coastal State to appropriate the oysters or other fructus of the bed of the territorial sea. In these instances the State is clothed with all the insignia of ownership. These rights, so far as the writer is aware, have never been challenged though claims have been made under conventions or on grounds of acquiescence of the State to participate therein. (47) Navigation is the only other use to which the territorial waters may be put. It must be admitted that the right of innocent passage must be accorded to all in times of peace. It is true, though less apparent, that the coastal State may regulate the exercise of the right, so long as that regulation be not oppressive. Apart from this conditional right, States generally have no rights in the territorial waters of another.

Lapradelle's/

(43) See Lord Medwyn's opinion in Commissioners of Woods v Gammell 1851 13 D. 855 at p. 873 founding upon the grants to the Isle of May monks which is open to criticism, -see Part I at p.38. See also Bell's Election Law p. 52 for alleged infestments (1639 -1704) in white fishings.

(44) P.189; Vattel i.ch.xxiii; Hautefeuille p.20

(45) See appendix 30 for recent examples. Also Fiore ss. 267-8

(46) i. ch. xxiii.

(47) (1910) Cmd. 5396. North Atlantic Fisheries Arbitration. case of David J. Adams. Nielsen p.534.

Lapradelle's objection that the State can have no right of property in the territorial waters must, it is considered, be repelled. If there is a servitude right over territorial waters it is the right of innocent navigation. The rights of the littoral State cannot be described as servitudes. On the other hand, if it be assumed that the State has merely the right of 'conservation' or a bundle of servitudes, then the question may be legitimately asked: what are the territorial boundaries or limitations to those rights? If protection of interests only is the object of the right, then the modern restricted limits are totally inadequate. "Conservation" was the plea in justification advanced by the United States for their prohibition of sealing outside the territorial waters in the Behring Sea and it was rejected by the Arbitration Tribunal. The State has only the right to protect its interest to the extent and in the manner permitted by international law. Neither the theory of Lapradelle nor that of Fauchille, though their views must be received with the utmost respect, appears to define in all its aspects the rights of States in the territorial waters. Fiore, admitting the State to have juridical possession of the territorial waters, denies the right of property, thus he brings out the distinction between 'possession' and 'ownership'. If, however/

(48) While the law as to the right of a belligerent to cut submarine cables is unsettled, it is generally agreed that to do so in the territorial waters of a neutral would be unlawful. This is not necessarily because the neutral State has a right of property, the damage may be greater and less easily repaired if the break is made in mid-ocean, but because to cut the cable is an act of war - in a neutral jurisdiction.

Oppenheim. ii. 409-410.

(49) The prohibition of the pollution of maritime waters within

however, the territorial waters are accessory to the land they partake of the same juridical character, in which case 'possession' must surely give place to the superior right of 'ownership.' The term 'property', implying State property or ownership in international law, is perhaps an unhappy term as it is liable to be confused with property held by the Crown as representing the community, not in the capacity of a sovereign State in active relation with other sovereign States. The term 'property' is therefore not preferred and is discarded as inadequate to define the rights of the State in respect of territorial waters.

XVI. The answer to the problem of the juridical status of territorial waters is to be found in the fact that the State, is acting in a sovereign capacity, in all circumstances exercising sovereign rights vis à vis other States, and, as a member of the community of States, subject to the duties and obligations imposed upon all States by international law. The theory of the 'droit de conservation', the theory of the right of property, and the theory of the right of jurisdiction - all recognise in gremino, this sovereign capacity of the coastal State. Lapradelle's theory does not deny it. The obligations imposed by international law in respect of territorial waters have grown out of custom long observed as binding and adapted in the practice of States to meet the special needs and circumstances of maritime/

(49) contd. 50 or even 150 nautical miles from the coasts was envisaged at the International Conference at Washington in 1926. Parl. Papers (1926) Cmd. 2769.

(50) Parl. Papers United States No. I. (1893) p.125.

(51) Paras. 276 & 1039

maritime dominion. In its uncertainty in detail the international law of territorial waters discloses an attempt to reconcile the sovereign necessities of the littoral States and the frequently competing demands of the community of States. (52)

XVII. The theory of the right of sovereignty has an ancient lineage. It has the support, frequently qualified, of the great majority of publicists. (53) (54) Bynkershoek considered that there was nothing in the Law of Nature or the Law of Nations, or even in the Roman Law, that stood in the way of sovereignty over the sea. But the sea must be possessed (dominated from the land): the mundane rights of fishing and navigation were not sufficient (55) for the acquisition of sovereignty. More recently, towards the close of the 18th century the qualification that the right exercised was a 'right of sovereignty' was advanced by Von Bar (56) and adopted by the Institute of International Law at the sessions of 1894 and 1925 and, finally, appears to have been the view accepted by the majority of States at the Conference for the Codification of International Law in 1930. (58) For the moment it need only be noticed that the reluctance to grant the right of sovereignty without qualification is due to the recognition of substantial restrictions upon the rights of the State and the duties/

- ✓ (52) Fiore para. 276; Shucking, League of Nations C. 351 (b) M. 145 (b) 1930 V. p.13.  
 ✓ (53) Fauchille I.2.pp. 135 & 143. (54) De Dominio etc.Ch.IX.  
 ✓ (55) Op. cit. Ch. V. (56) Lapradelle Lect. 19.  
 (57) Institute of International Law.p. 113; Revue 1925. p.186.  
 (58) League of Nations. cit. sup.



duties imposed by international law. Nys, for example, considers these restrictions to be such as to warrant a denial of sovereignty. The argument means that there can be nothing in international law corresponding to the radical right. At what point then does the sovereignty of a State vanish owing to treaty concessions? It is not that the sovereignty has been lost but merely that the State has obliged itself in a sovereign capacity<sup>as</sup>/to the particular manner in which the sovereignty shall or shall not be exercised. In the post 1918 period the series of peace treaties and conventions under the aegis of the League of Nations imposed many restrictions and obligations on States which cut deeply into their previous freedom and sovereignty. (59) Yet it has not been concluded therefrom that the states concerned have been degraded from sovereign rank.

XVIII. The chief objections to the right of exclusive full sovereignty are the duty of allowing merchant ships of other nations to navigate the territorial waters and the absence of a universal jurisdiction over ships of whatever flag which pass through that belt. These are untenable. In the first place, the term "exclusive sovereignty" in its former absolute connotation is no longer applicable to States: all are under the obligations imposed by international law. Today 'exclusive sovereignty can mean only 'sovereignty exercisable in accordance with/

---

(59) E.g., the disarmament clauses of the Versailles Treaty. C.f. also the opinion of the Tribunal in re North Atlantic fisheries that the partition of sovereignty does not follow from treaty concession. Parl. Papers (1910) Cmd. 5396 pp. 12 & 13.

(60)  
 with international law.' The description of the state sovereignty over the territorial waters as 'limited, attenuated or diminished', while plausible, is erroneous in that the description rests upon an impossible hypothesis. These terms imply that there is or can be an ideal State untrammelled in its sovereignty by any restriction or obligation towards other States. From the point of view of international law no such State can exist. It is a condition of the membership of the community of States that all States, called independent States, undertake in their relations inter se, to observe as binding those rules or customs and express contractual obligations which form the very core of international law. Even if a State is required to permit 'innocent passage' on the territorial waters, it does not thereby lose its sovereignty any more than in former times a neutral State, which had obliged itself to permit the passage of the troops of a belligerent, lost its right to be deemed a neutral. The right of innocent passage and the admission of the jurisdiction of the flag State are concessions granted without detriment, be it noted, to the interests of the coastal State, for the benefit of inter-state commerce, concessions necessary in a community of peoples economically interdependent. These cannot be deemed substantial derogations from sovereignty for they are conceded by large and small States, powerful and weak States alike. The flag State/

---

(60) 'Sovereignty' within the limits of the State, internal sovereignty, is not under consideration here as that falls within the province of constitutional law and jurisprudence

State may exercise a jurisdiction over the crews and vessels in transit upon the territorial waters of another State - even in foreign ports, but that permissive jurisdiction may be ousted by the exercise of the superior territorial jurisdiction of the littoral state should its interests be endangered. (61) The inroad of the right of innocent navigation is of fairly recent date. In the treaty between Britain and Sweden in 1654 it is the subject of express contract and the parties engage themselves to further the object not only in their own appropriated waters but also in the Mediterranean and other European waters; a similar engagement (62) was made in the treaty with the Danes in 1660. Provisions as to innocent navigation in territorial (coastal) waters (63) do not appear in the American treaty in 1815 nor in the later commercial treaties entered into by Britain. The rule (63a) of law, although again mentioned in some recent treaties, is now so universally recognised that express contract is unnecessary: but it does not thereby follow that the universal application of the rule has nullified the sovereignty of the littoral State.

"The territorial sea must be considered as constituting a part of the domain of the State to which the coast belongs. By virtue of this eminent domain, every State has the exclusive right to provide for the security and defence of its territory, the protection of the private interests of its citizens, the free carrying on of commerce, and the protection/

(61) See post Chap.V and for examples of conventional provisions see Martens' Recueil 3<sup>o</sup> Ser. Tom. 31.pp. 302, 306, 637

(62) See Appendix 21.

(63) 'Ports and rivers' see Appendix 17

(63a) See treaty between U.S.A. and Norway. Ratified 1928. Martens' Recueil 3<sup>o</sup> Ser. Tom. 31. p.302.

protection of the general and fiscal interests of the State."

" The State cannot subject merchant ships crossing territorial waters to the payment of any fees or be regulated to render transit oppressive or difficult." (65)

(66)

Ortolan, who denies the right of property, admits that for defence the State has over the navigable coastal waters a right of empire, a power of legislation, supervision, and jurisdiction conformable to the rules of international law.

(67)

Wheaton, accepting the same rights with the addition of fishing and the duties imposed by law upon neutrals, considers that they do constitute sovereignty over territorial waters. The right of self-preservation and the protection of its interests (except where restrained by international law) is a fundamental right of sovereignty. Apparent restrictions thereupon and obligations imposed by law upon the State do

(68)

not rob it of its sovereignty. As noted in chapters V and VI a neutral State retains very wide powers upon its territorial waters. Finally, the exercise of the flag State's jurisdiction is not prohibited, but permitted and personal, applying only to the vessels under the national flag and is not distinguishable in its broad features from that exercised

(69)

with consent in the ports and harbours of another Power. On the contrary, the jurisdiction of the littoral State in the territorial/

✓(64) Fiore p. 178 para. 265

✓(65) Fiore para. 278; This does not appear to be affected by the treaty mentioned in footnote (63a).

✓(66) i. ch. 8.

(67) i. 368. See also Van de Wetering in Revue (1923) p. 35; Hyde i.s. 141.

(68) Moore Digest i.s. 4. See also p. 152.

(69) Institute of International Law p. 144; see also appendices 12 - 17 and B.Y.I.L. Vol. 1. p. 45 re foreign ships in territorial waters.



territorial waters may be applicable to all within the belt and that jurisdiction, it is held is sovereign. <sup>169a) 59 a/</sup>

XIX. Thus the most appropriate definition of the juridical status of the territorial waters is that they are under the territorial sovereignty of the littoral State. This definition postulates that the territorial waters are assimilated to the land in the sense that the State has the exclusive jurisdiction as to legislation and control together with the exclusive proprietary rights.

"Territorial sovereignty is, in general, a situation recognised and delimited in space, either by so called natural frontiers as recognised by international law or by outward signs of delimitations that are undisputed... or by acts of state within fixed boundaries." (70)

Also:

"Territorial sovereignty involves the exclusive right to display the activities of States." (71)

The State exercises an exclusive legislative and police control: it has the exclusive right to the fructus: it may exclude from the belt those who give cause for complaint: it displays the activities within a delimited area. At the same time, recognition as a sovereign State is conditional upon the obligations vis à vis other States imposed by law being fulfilled within the sovereign jurisdiction. The needs of each locality differing, the details of the legislation/

(70) Max Huber, Arbitrator in the Island of Palmas Case. Hague Court Reports (Scott) (2nd Ser.) p.92.

(71) do. p. 93. There is perhaps no more concise statement of the British case for sovereignty upon the marginal belt than the speech of the Lord Chancellor in the debate on the first reading in the House of Lords of the Territorial Waters Jurisdiction Bill, Hansard 3rd Ser. vol. 237 1601.

legislation affecting territorial waters must be determined by each legislature according to its own view, and, so long as exercised in a reasonable manner, will be acquiesced in. <sup>(72)</sup> This sovereign power, <sup>is</sup> in its nature, no different <sup>(73)</sup> from that exercised upon the land domain. The apparent modifications and derogations are imposed by the rules of international law derived from custom and express compact and suited to the peculiar needs of the community of States upon territorial waters which may form part of the ocean highway.

XX. The use of the term 'territorial sovereignty' serves to distinguish between the jurisdiction exercised upon the waters immediately adjoining the open coast and those functions of defence upon the contiguous zone which States <sup>(74)</sup> claim to be within their power. The most important distinction to be drawn is that the duties of the neutral coastal State are not pretable in this outer belt which neither that State nor other States consider to be within the territory or exclusive territorial jurisdiction. Conversely, no State can claim the respect due to the neutral territory in that belt.

XXI./

---

(72) Stowell p. 51. See appendix 27. The temporary agreement between the U.K. and the U.S.S.R. was a compromise arranged following upon a difference of opinion as to the extent of territorial waters.

(73) League of Nations C.230. M. ii7. 1930. v.p.6.

(74) See post pp.159.

XXI. The conception of the contiguous zone has been developed as it became more and more recognised that to restrict the territorial waters along the open coast to three miles does not provide adequate scope for the protection of the country's interest. Such is the variety of modern requirements that it is difficult to envisage a limit which will meet every apparent necessity without throwing an undue burden of police upon the adjacent State. Apart from the situations created by the important factors of the increased speed of transport, including aircraft, the possibility of international action to prevent the pollution of the sea with oil from vessels within fifty miles or even one hundred and fifty miles of the coast was mooted at an international conference (75) at Washington in 1926. Considerations of this burden of police influence the policy of Great Britain in adhering to the principle of restricted territorial waters, but, at the same time, a willingness has been expressed to meet the special needs of particular States by conventions for specific (76) purposes. It is undoubtedly true, however, that a State may without objection take measures within the contiguous zone to frustrate any expedition clearly intended to damage its territory, its citizens or to breach the revenue or sanitary laws. The State, so to speak, anticipates the injury./

(75) (1926) Cmd. 2769. pp. 369 et seq.

(76) League of Nations, C. 351(b) M. 145(b) 1930 V. p.126.  
See also Appendix 24.

injury. Consequently, there is to be found in the municipal law of the United Kingdom and the United States, provision for the extension of the jurisdiction in respect of foreigners (77) beyond the normal limit of territorial waters. Lawrence states what appears to be the British view - that these acts of the State are tolerated not as rights but out of courtesy, (78) i.e. the comity of nations. As Sir Charles Russel put it in his evidence before the Arbitration Tribunal for the Behring Sea dispute, "I will suggest that the very idea of defensive regulation or defensive act, repels the idea of cut and dried formulated rules." The British Hovering Acts aim at preventing acts within the jurisdiction but do not purport to extend (79) the limits of territorial waters.

XXII. The right to take steps to prevent ships 'hovering' outside the limit of territorial waters with a view to smuggling or to prey upon shipping issuing from the ports was early (80) in (81) (82) recognised in the Law of Scotland and/England. Oppenheim took the view that, as the municipal laws had been in existence for some hundred years, they had probably hardened into a rule of customary international law. The weight of opinion and municipal law certainly favoured that conclusion, yet, when the issue was sharply raised in connection with the enforcement/

(77) Parl. Papers. United States No. 4(1893) at p.60.

✓ Wheaton i. 367. See also following notes.

(78) Lawrence p. 182; Le Louis (1817) 2 Dobson 210 at 245.

Halleck i. 168; Twiss (Peace) 310; Westlake i. 175.

Stowell, 323-326; League of Nations C. 351 (b) M(b)

1930. V. p. 126; Jessup Ch. ii. For an examination of the practice of various States. See also B.Y.I.L. 1939.p.122

(79) Parl. Papers. United States, No.4. (1893) p.60.

(80) (Scotland) Morrison's Dictionary (1713) 11940; British/



enforcement of the prohibition laws of the United States consequent on the 18th Amendment of their Constitution, it was seen that the United Kingdom took their stand upon the broad principle that the preventive jurisdiction, involving a right of search upon the portion of the high seas outside the territorial waters as ordinarily understood, was not a right conferred by international law but only an exercise of the sovereign function of State-protection beyond the territorial jurisdiction, tolerated out of courtesy and the desire to facilitate the administration of municipal law designed for the social improvement of the community. To obtain a right in law required an express compact. Accordingly, a treaty was entered into between Great Britain and the U. S.A. which served as a model for other treaties between the United States and other European countries. A similar problem arose with the Baltic States and was solved in the same way. Britain and Finland made a treaty and the Baltic States made a convention conferring a special ad hoc jurisdiction outside the ordinary limit of territorial waters for the suppression of the liquor traffic. In the treaties to which the U.S.A. and Britain/

(80) contd. British Hovering Acts 1736 repealed by and partly re-enacted by the Customs Consolidation Act, 1876.

(81) Marsden, ii. 217-8. (82) Oppenheim, i. 390.

(83) Parl. Papers, Cmd. 2063. See ransard, House of Lords. 5th Ser. 1923 vol. 54. 714-732 where the international law was discussed by the Foreign Secretary, by Earl Birkenhead and Earl Grey, a former Foreign Secretary.

(84) See Jessup, p. 234 for a list of the American treaties.

(85) Parl. Papers, (1932-33) Cmd. 4436.

(86) De Martens Nouv. Rec. 3<sup>e</sup> Ser. 20. 131.

Britain were parties, it is expressly affirmed, as a principle of international law, that the proper limit of territorial waters is three miles from the shore. Such an explicit treaty declaration must override any pronouncement by their municipal Courts or officials. That other States are not content with such a narrow margin of waters was disclosed at the Conference for the Codification of International Law in 1930. Some States were in favour of a restricted belt of territorial waters with a special jurisdiction upon the contiguous zone, while other sought to extend the territorial waters for all purposes, that is, (87) to have one belt only. If the views of the leading European and American nations and of Japan are correct - they cannot be ignored - then the contiguous zone does not form part of the territorial waters proper. In that zone the State has not the exclusive sovereign rights, but only the same rights as it possess upon the high seas with such additional jurisdiction in respect of the vessels of other nationalities as can be obtained by compact and the comity of nations. In that such treaties confer a special jurisdiction upon the high seas for definitely agreed purposes, they do not differ (88) from the North Sea Fisheries Convention and the recent Agreement between the United States and Canada for the (89) Preservation of the Halibut Fisheries of the Behring Sea which/

(87) League of Nations C. 351.(b) M.(b) 1930.V. p.123 et seq.

(88) Appendix 28.

(89) do. 23 See also International Convention on Radio Telegraphy (1927) De Martens Nouv. Rec.3<sup>e</sup> Ser. Tom.XXVI p. 234 and between Denmark, Sweden, Norway and Finland, 1928-29. Do. 3<sup>e</sup> Ser. Tom. XXXI p.811.

which confer a limited concurrent jurisdiction upon the signatory States upon the high seas, but reserve to the coastal State the exclusive jurisdiction in the area of territorial waters. It follows that the contiguous zone is not within the territorial waters of the States, but, on the contrary, forms part of the high seas for juridical purposes.

XXIII. Max Huber's suggested criteria in the Island of  
(90)  
Palmas case for the recognition of territorial sovereignty are satisfied in the case of territorial waters, i.e., exclusive sovereignty exercised over a delimited portion of the surface of the globe and recognised by all interested States.  
(91)  
It has been objected to concede that the territorial waters form a part of the territory of the State is invalid, because the boundary of the State then becomes a hypothetical line, "une ligne de respect", upon the high seas. The objection cannot be sustained. True it is there is no rule of law determining precisely the limit of the territorial waters of  
(92)  
all States but there can be no question that the minimum  
(93)  
claimed is the breadth of three miles from low water mark along the open coast. Other States which claim a greater extent, have, on occasion, adopted very definite limits. That being so, there cannot be more objection to the adoption of an arbitrary boundary on the sea than there is to a line of  
latitude/

(90) Cit. sup. p.157 (91) Fauchille. I.2.p.127.

(92) See post Chap. IV.

✓(93) Moore's Digest. i. s.145; League of Nations. Cit. sup.

latitude for a boundary between the United States and Canada.

(94)

XXIV. The objections offered by Fauchille to the theory of the absolute territorial sovereignty in the marginal sea have been divided into eight heads, viz. on the assumption that the territorial waters form part of the territory (absolute property) of the State it would follow that :-

(a) The Coastal State may interdict or prohibit all vessels from its waters. It will only be a concession to admit vessels of strangers. (b) Admission will be on such terms as the State may devise including payments for harbourage, customs, etc. The waters will really be part of the national territory and there will be a right to take protective measures so that there must be another zone for that purpose. (c) The civil and criminal jurisdiction for all acts, including the acts on board private ships and even the reservation of jurisdiction and pursuit of pirates, must be exclusively with the ex adverso State. (d) The territorial State must be left to fix the details of the ceremonial to be observed by ships in respect of its flag. (e) The coastal State as the proprietor is entitled to the exclusive enjoyment of the produce of the coastal waters and may take the appropriate steps to protect the right. For a like reason, it may reserve the coastal shipping for its own subjects. (f) The bordering State may dispose of the territorial sea like any other/

---

(94) I. 2. pp. 134-5.



other portion of its territory: (g) Birth upon a vessel within the territorial waters makes the party a national of the coastal State: (h) In time of war it will be necessary for the State to ensure that a belligerent does not transgress the frontier - otherwise the neutral State must disarm the intruder as in the instance of land frontiers. Of these objections, heads (e) and (h) have been dealt with already, the former in connection with the theory of the right of property and the latter in connection with Lapradelle's theory of servitudes in favour of the adjacent State (95).

XXV. The first and second objections arise out of the right of innocent navigation. It is replied that it was formerly the practice to impose restrictions upon shipping within the appropriated seas, these restrictions being in the conceived interests (96) of the State, e.g., the possible enrichment from dues or for services rendered. This right was recognised until patent abuse (97) led to its abrogation. For over two and a half centuries no European territorial waters have been closed to commercial navigation and Hall concludes that the right must be held to be (98) established in the most complete manner. The words used in the phrase 'right of innocent passage' refer to the (99) character of the passage not to the type of the ship: indirectly it emphasizes the right of the coastal State/

---

(95) See ante 139 and 140 and 145 et seq.

(96) See part I.

(97) Craig Jus Feudale I. 16. 17; Bell's Principles Para. 640.  
(Danish /

State to protect its interests be the vessel private or public. Further, the vessels are subject to such reasonable restrictions as to navigation and sanitary precautions as the littoral State may impose. Whenever the interests of the State are threatened or the peace of its waters is broken, the right of navigation is lost, for it is no longer innocent, and the vessel becomes subject to the fullest extent to the jurisdiction of the State. (100)

While it is a duty, however slight the burden be, imposed by international law to allow this freedom of passage, the rights of the coastal State are so far predominant that, despite the declaration in Article 10 of Convention XIII of the Hague (101) to the effect that the mere passage of belligerent men-of-war and their prizes does not violate the neutrality of a Power, it has been held that States, even in time of peace, may, and in practice do, regulate the passage and entry of foreign warships into their ports. (102) In time of war the regulations may be very stringent. Holland, in 1914, closed its maritime waters to belligerent men-of-war, and Norway, in 1916, excluded belligerent submarines from territorial waters. (103) The right of innocent passage is conferred by international law but it does not follow, because there is a corresponding duty/

(97) Contd. Danish Sound Dues were abolished in 1857.)

(98) Hall, p. 197. See also Stowell p. 149

(99) Lawrence. p. 184

(100) See Jessup p. 33, who would distinguish between 'jurisdiction' and 'control'.

(101) Hague Conventions p. 847. The British proposal would have prohibited a neutral from refusing the right of passage. The Article adopted is a compromise.

(102) /

duty imposed upon the State to allow the right to be exercised, that its territorial sovereignty is thereby avoided. Indeed, the general tendency is to grant, on a basis of reciprocity of treatment, the same freedom and privileges as are accorded to national vessels - even in ports which are acknowledged (104) to be within the territorial jurisdiction.

XXVI. As to the exercise of a criminal and civil jurisdiction by the coastal State, head (c) of the objections, it may be said generally that a vessel entering the territorial waters of another State voluntarily subjects itself to the jurisdiction of that State, but it must be left to the State (105) to judge whether it will exercise a jurisdiction. Generally, the state will act only if its interests are threatened or the peace of its waters disturbed. Mere transient passage does/

(102) Vattel ii. s.123; See Treaties in Appendices 12 & 13.

(103) Oppenheim ii. 560; See also Chap. VI.

(104) See the Geneva Convention on the International Regime of Maritime Ports (1923), (1925 Cmd. 2419). The Barcelona Convention for the Freedom of Transit (1921) (1923 Cmd. 1992).

(105) Cunard Steamship Co. v Mellon. (1923) 262 U.S. 100. Moore's Digest. s.144 quoting Institute of International Law Resolution; The following excerpt is from the I'm Alone. U.S. Arbitration Series. No.2 (4) p.101. "His Majesty's Brittanic Government do not deny the strictly legal right of the United States or any other country to impose its jurisdiction on all ships whether national or foreign within its territorial waters. His Majesty's Government themselves claim that right and it is even the case that some of the provisions of the British Merchant Shipping Acts are such that ships visiting ports in the United Kingdom must comply with them before entering and after leaving the jurisdiction. These provisions, however, relate solely to the safety and welfare of the ship, crew and passengers. Similar provisions exist in the legislation of the United States and other countries and they are generally recognised as reasonable.



does not impinge upon the interests of the State and any officious interference would be regarded as unjustified and objectionable. There is no point in a State attempting, even if it were possible and convenient, which it is not, to impose its domestic laws other than navigation rules upon a vessel merely passing through the territorial waters. Under the Territorial Waters Jurisdiction Act, the fiat of the Secretary/

(105) Contd.

It is, however, equally well recognised that the circumstances of ships, travelling as they do from port to port in many different countries, are peculiar and that to subject them to all the different and often conflicting requirements of the various jurisdictions they may enter, would create an impossible situation. Consequently, as a matter of comity and practice, the maritime Powers refrain from imposing their jurisdiction on foreign ships except for the purposes stated above, namely the safety and welfare of the ships, crews and passengers. The principle was well stated in the dispatch of October 28, 1852, from Mr Conrad, when Acting Secretary of State, to the United States Minister at Madrid, wherein he writes:-

"You will state that this government does not question the right of every nation to prescribe the conditions on which the vessels of other nations may be admitted into her ports. That nevertheless those conditions ought not to conflict with the received usages which regulate the commercial intercourse between civilised nations. That those usages are well known and long established and no nation can disregard them without giving just cause of complaint to all other nations whose interests would be affected by their violation."

The United States Government have indeed given recent proof of their fidelity to the same principle, in exempting ships trading between the United States and Italy from the strict application of the Volstead Act, on the ground that Italian law requires the provision of a certain amount of liquor on such ships.

In informing you of the above I am directed to express the earnest hope that means may be found to modify the present application of the Volstead Act to British ships, and thus to remedy what is, in effect, an unwarrantable interference with the domestic concerns of British ships on the high seas."

(106) Fiore p. 306 would have variable limits.

^(107) 41 & 42 Vic. c. 73.



Secretary of State is necessary before a prosecution can be instituted for an offence alleged to have been committed within British territorial waters. The purpose of this provision is to reserve to the State the right to decide whether it is expedient to exercise the jurisdiction in any particular case. In brief, the jurisdiction, civil or criminal, is of the nature of a jus merae facultatis. It is the elementary right of protection which is the essential element of Fauchille's own theory of 'droit de conservation' and, when exercised, is effective to exclude the jurisdiction of the flag State. (108)

XXVII. There is no point in the seventh (g) objection. While there are many rules common to most nations whereby the status of nationality is determined, ultimately, it must rest with each State to claim allegiance from a party (109) on the grounds of parentage or place of birth. Nationality is frequently the subject of conventions to avoid dual nationality or statelessness arising from conflicting municipal laws. Naval ceremonial, head (d) of the objections, is of so little importance in these modern times that it need not be discussed.

XXVIII. In conclusion, Fauchille's <sup>head</sup> sixth (f), that the State ought to be able to dispose of its territorial waters <sup>in/</sup>

---

(108) This jurisdiction of the coastal State is more fully discussed in Chapter V.

(109) Jessup. 115-6.

in the same manner as any other part of its territory, overlooks the very special connection between the coast and the territorial waters which are regarded in international law as effeiring to the land as an accessory or appurtenance of the coast. In such circumstances the accessory and necessary adjunct can be alienated only with the principal subject, the coast. (110) These objections by pauchille to the right of territorial sovereignty upon the territorial waters rest upon the premise that 'absolute sovereignty' is vested in the State, but, as already stated, no nation, as a member of the society of States, is possessed of such unrestricted, ideal sovereignty, but it has duties, as well as rights, imposed by international law.

XXIX. There is ample, it is suggested, conclusive evidence that the whole course of conduct of States in respect to territorial waters has been based upon and regulated by the belief that they possess the right of territorial sovereignty upon these waters. It is the consequence, de jure, of State appropriation in a sovereign capacity of the marginal seas and bays. Without this conception, states could not reserve for their nationals the exclusive right to the products of these waters: neither could they competently reserve to themselves the <sup>exclusive</sup> right of legislation for police and other sovereign purposes upon the territorial waters. Municipal legislation affecting territorial waters is essentially territorial/

---

(110) Oppenheim. i. p. 359.

territorial except where is expressly stated to apply to nationals only. Any party entering the waters subjects himself to the jurisdiction of the adjacent State. It is as between territorial sovereigns that the long series of treaties have been entered into conferring or regulating rights and duties of States in territorial waters; it follows from this same territorial sovereignty that the coastal State is liable in international law for dereliction in the duty to protect the interest of other whose jurisdiction is excluded. The territorial waters of a neutral State partake the same juridical status as the territory and are equally sacrosanct: hostilities are strictly prohibited therein: the belligerent rights of visit and search and of capture lapse as soon as the pursued enters the sanctuary of territorial waters.

XXX. The conception of territorial sovereignty and its limitations upon territorial waters may be illustrated by two early opinions of the United States Supreme Court, which in their generality, are today of unimpaired validity.

"The laws of no nation can justly extend beyond its own territory except so far as regards its own citizens. They can have no force to control the sovereignty or the rights of any other nation, within its own jurisdiction." (113)

"The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other....all sovereigns have consented to a relaxation in practice, in cases/

---

(111) Behring Sea Arbitration - British Argument, Parl. Papers U.S. No. 4 (1893) pp. 51, 56-7; Cunard Steamship Co. v Mellon (1923) 262. U.S. 100; Mortensen v Peters (1906) 8 F (J) 93.

(112) See Appendices 12 to 23 for examples.

(113) The Appollon (1824) 9 Wheaton 362 at p. 370.



cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

X X X X X X X X

A nation would be justly considered as violating its faith, although that faith might not be expressly plighted, which should suddenly and without previous notice, exercise its territorial powers (in territorial waters) in a manner not consonant to the usages and received obligations of the civilised world." (114)

XXXI. The essential element of the locus in questions involving the immunity claimed for neutral waters is stressed in the classic opinion of Sir William Scott in the Twee Gebroeders. (115)

"The first fact to be determined is, the character of the place where the capturing ship lay; whether she was actually stationed within those portions of land or water, or something between land and water, which are considered to be within the limits of Prussian (neutral) territory? On this point I am inclined to think .... she was lying within the limits, to which neutral immunity is usually conceded."

XXXII. Direct evidence of the right of territorial sovereignty as a rule of international law is afforded by a long series of decisions in the Prize Courts, - that no private party can claim the restoration of a vessel taken by an enemy in neutral waters: only States whose sovereignty has been disrespected have a locus standi to claim restitution. (116) This was noted in the case of the Twee Gebroeders. (117) In the case of the Bangor the point was put thus by Sir Samuel Evans.

"No/

(114) The Exchange (1812) 7 Cranch 116 at page 136.

(115) 1800 3 Rob. 162 at p. 163. (116) Cit. sup.

(117) [1916] P. 181 at p. 185



"No proposition in international law is clearer, or more surely established, than that a capture within the territorial waters of a neutral is, as between enemy belligerents, for all purposes rightful; and that it is only by the neutral State concerned that the legal validity of the capture can be questioned. It can only be declared void as to the neutral State and not as to the enemy."

Precisely in point is the opinion of Lord Stowell in  
(118)  
the case of the Eliza Ann.

"A claim has been given by the Swedish consul for these ships and cargoes, as having been taken within the territories of the King of Sweden, in violation of his territorial rights. This claim could not have been given by the Americans themselves, for it is the privilege, not of the enemy, but of the neutral country, which has the right to see that no act of violence is committed within its jurisdiction."

(119)  
An early Scottish case, Hunter v Count de Bothmer, may be noted as of interest. There, a British ship, having been recaptured 'within the limits of a neutral port', was ordered to be restored to the neutral power. The King of Denmark claimed restitution on the grounds of alleged violation of the "neutrality subsisting between the two Kingdoms".

This rule is not affected by any provision of the  
(120)  
Hague Convention No. XIII of 1907. It was followed at the instance of the Norwegian Consul-General in London in  
(121)  
the Dusseldorf during the European War. The rule rests entirely upon the rights and duties consequent upon the territorial/

(118) (1813) 1 Dods 244; See also Lord Stowell's opinion in the Vrow Catharina (1803) 5 Rob. 15 considered in the Dusseldorf 1920 A.C. 1034; The Valeria 1920 P. 81 and The Pellworm 1922 1. A.C. 292

(119) Morrison's Dictionary. Appendix - Prize. Case 52 p. 11957 (1801); See also Benton v Brink (1761) p. 11949. loc. cit.

(120) The Bangor [1915] P. 181.  
(121) 1920 A.C. 1034

territorial sovereignty of the adjacent neutral State in respect to the territorial waters. Article 1 of the Convention XIII (Rights and Duties of Neutral Powers in Maritime War) of the Second Hague Peace Conference, 1907, speaks of "Sovereign rights .... in neutral waters " which would seem to indicate that the States themselves consider their sway over the maritime belt to be of the (121a) nature of sovereignty.

XXXIII. It is a sovereign duty to protect the State from threatened or possible danger and, as has already been noted, action may be taken to this end before the vessel enters the territorial waters. In addition to the evidence of the 'hovering' Acts of various States the right may be (122) illustrated by the incident of the Kearsarge. There, the French Government, considering that the Kearsarge, a belligerent vessel, would be engaged as soon as it left the sanctuary of the French (neutral) waters, convoyed it beyond that limit to secure that no hurt should happen within their jurisdiction. The American Government, on their part, while advising their commander to be discreet, vigorously protested against the action of the French as unwarranted and without sanction in international law. The French in reply claimed no territorial jurisdiction beyond the limits of the territorial waters but they asserted the right to ensure that no danger could arise from hostilities near them.

---

(121a) Hague Conference Reports. p. 841.

(122) Pitt Cobett II. 409. Moore's Digest. i. s. 150.

XXXIV. The published instructions and opinions of American statesmen are especially clear as to territorial sovereignty.

"The President of the United States, thinking that, before it shall be finally decided to what distance from our shores the territorial protection of the United States shall be exercised...." (123).

"The exclusive jurisdiction of a nation extends to the ports, harbours, bays, mouths of rivers and adjacent parts of the sea enclosed by headlands; and also, to the distance of a marine league, or as far as a cannon-shot will reach from the shore along its coasts." (124).

The American view is unchanged. In the case of the Cunard Steamship Company:

"It is now settled in the United States and recognised elsewhere that the territory subject to its jurisdiction includes the land areas under its dominion and control, the ports, harbours, bays and other enclosed arms of the sea along its coasts, and a marginal belt of the sea extending along its coast outwards a marine league or three geographic miles." (125)

The American delegate to the Conference for the  
(126)  
Codification of International Law adhered to this view.

XXXV. The British view, as contained in the Territorial  
(127)  
Waters Jurisdiction Act, is dressed with ample authority  
(128)  
in respect of the British territorial waters.

"The territorial waters of Her Majesty's dominions",  
in/

- 
- ✓ (123) Moore's Digest. ii. s.145  
 ✓ (124) do. Mr Buchanan Sec. of State to Mr Jordan,  
 Jan. 23rd. 1849.  
 (125) (1923) 262 U.S. 100.  
 (126) League of Nations C. 351. M. 1930 V.  
 (127) 41 & 42 Vic. c.73.  
 (128) For opinions of publicists see Hurst, "Whose is the  
 Bed of the Sea." B.Y.I.L. (1923-24) p.34.



in reference to the sea, means such part of the sea adjacent to the coast of the United Kingdom, or the coast of some other part of Her Majesty's dominions, as is deemed by international law to be within the territorial sovereignty of Her Majesty; and for the purpose of any offence within the jurisdiction of the admiral, any part of the open sea within one marine league measured from low water mark shall be deemed to be open sea within the territorial waters of Her Majesty's dominions.

XXXVI. This Act does not deal with the jurisdiction upon bays.  
(129)

The much discussed case of Reg. v Keyn which prompted the Act, touched the criminal jurisdiction of the municipal Courts under the municipal law in respect of the territorial sea only. This was the sole point raised by the case. It cannot be too strongly stressed that the judgment was passed only upon a domestic issue peculiar to English municipal law; the opinions for and against a jurisdiction in international law were obiter dicta only and have been overrated. The decision of the Court being that under the municipal law they had no criminal jurisdiction upon the territorial waters of the Kingdom, the sovereign legislature proceeded in the Act to confer that jurisdiction to which the State claimed to be entitled by international law. From the care bestowed upon the drafting of the Act, it must be held to have been the considered view of the British Government as to the state of international law at that time.  
(130)

The British general view as to the territorial sovereignty

---

(129) (1876) 2 Ex. D. 63.

(130) See speech of the Lord Chancellor, Hansard 3rd Ser.  
Vol. 237, p.1601 et seq. and 1616.



sovereignty of the State upon the territorial waters was advanced in the British Argument submitted to the Behring (131) Sea Arbitration Tribunal. Britain claimed the right in law to appropriate the coastal waters and to legislate for the fisheries for all persons, British and foreign. Britain also legislated for nationals beyond the limits of the territory but such legislation, even though <sup>in</sup> its terms applicable to all, had never, contrary to the American assumption, been applied to foreigners outwith the territorial waters. The British legislature and the Courts have always proceeded upon the maxim extra territorium ius dicenti impune non paretur. It was upon the same principle that the Executive refrained from applying to foreigners the regulations as to methods of fishing in (132) the Moray Firth. In brief, the British view has been and is invariably in favour of territorial sovereignty upon the territorial waters: beyond these limits the jurisdiction is personal.

XXXVII. The post-European War period has given a number of treaties and conventions which expressly state that the adjacent State has the right of territorial sovereignty upon the territorial waters or contain terms from which this right must be concluded. The convention of 1920 relating to/

(131) Parl. Papers, United States No.4. (1893) pp 39-63

(132) See post at pp 78, 222 et seq.

(133)

relating to Spitzbergen, to which nine States were signatories while conceding to these many rights in territorial waters usually reserved entirely for nationals, recognises, "subject to the stipulations of the present treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitzbergen" and "the territorial waters". Territorial sovereignty is preserved in the recent treaties and agreements between (a) Canada and the United States in regard to the Halibut Fishing in the North Pacific Ocean and (b) the United Kingdom and the U.S.S.R. in regard to navigation and fishing.

XXXVIII. Finally, the Paris Convention of 1919 for the Regulation of International Air navigation, to which twenty States were signatories, by its first article stipulated that "The Contracting States recognise that every State has exclusive sovereignty in the air space above its territory and its territorial waters". This principle has been adopted generally in subsequent national legislation of both signatory and non-signatory Powers, and by Britain in subsequent treaties touching international navigation. It necessarily follows that these signatory States, while legislating for

---

(133) See Appendix 20. (134) (1925) Cmd. 2377.

(135) Handbook of Commercial Treaties p. 618.

(136) (1930) Cmd. 3583.

(137) Jessup, 116 and also following treaties. p.637  
 Denmark and Greece. 1928, Martens Nov. Rec. 3<sup>e</sup> Ser.T.31./  
 Germany and S.Africa. do. do. do. 796.  
 U.S.A. and Norway. do. do. do. 302

(138) Austria. (1932-33) Cmd. 4435. "Art.1. For the purpose of the present convention the term 'territory' means the United Kingdom... including the territorial waters adjacent thereto."

the air, are thirled to the principle of sovereignty over territorial waters and that sovereignty is 'territorial'.

XXXIX. It would appear, therefore, from the above summary of those acts of State and State organs, which are the best evidence of the rules of international law, that the juridical status of the territorial waters that these are under the territorial sovereignty of the adjacent State; that territorial sovereignty is to be exercised subject to the special rules of international law applicable to the territorial waters.

---

(138) contd. Greece. Treaty of 17th April 1931 (1931-32) Cmd. 4160. 'Art. 1. The term 'territory' or 'territories' includes territorial waters.  
C.f. The Nyon Agreement (1937) where special provision was made in respect to territorial waters as distinct from the open sea. (Cmd. 5568) Treaty Ser. No. 38 (1937) XVII. 385 and (Cmd. 5569) Treaty ser. No. 39. XVIII. 43

## CHAPTER IV.

## The Extent of Territorial Waters.

I. There is no more controversial topic in the law of territorial waters than that of their extent. It has received greater or less attention from all writers on the law of territorial waters: it was the rock upon which the Second Commission of the Conference for the Codification of International Law in 1930 foundered. To re-examine in all its historical detail a subject already so well explored would serve no useful purpose in this essay which is primarily concerned with the law applicable to waters around the Scottish coasts. Nevertheless, to obtain a proper perspective, some reference to the views and practice obtaining elsewhere must be made.

Section A

## The Marginal Sea.

I. Perels has stated concisely the raison d'être of the territorial sea as being (a) the security of a maritime State requires the possession of its marginal waters; and (b) the surveillance of ships which enter these waters, whether passing through or stopping there. These are demanded in order to guarantee (a) the efficient police, (b) the development of the bordering State and its political, commercial and fiscal interests, and (c) the enjoyment of the possession of territorial waters which serves to sustain the population on the coast, and, the writer would add, to provide a nursery for seamen.

(1) League of Nations C. 230. M.117. 1930.V. p.3

(2) See Fulton. Pt.II. Chs. I & II: Jessup, Ch.I et passim

*Harvard Research* p.250 *et seq.*



seamen. The extent to which a State may appropriate the  
waters has been stated equally concisely by a recent writer.<sup>(3)</sup>

"The international interest, although conserved by such action (state control over the marginal seas) on the part of the individual State, was, however, also solicitous that the extent of the water area be narrowly limited and sharply defined. Thus it was not the extent or the width of the marginal sea which an adjacent State was capable of occupying, but rather the amount which it could occupy without obvious detriment to the society of nations as a whole, which was, and yet remains, an object of concern."

Conjoined, these two statements set out the practical difficulties of international law as to territorial waters.

II. We find in the earliest period of the regime of restricted territorial waters that the object or purpose held prior place. Thus, in the Stuart proclamations of neutrality the limits of waters within which hostilities were prohibited were so reasonable that no objection was raised by other States; yet the claim to the sovereignty<sup>(4)</sup> of the more extensive British Seas was continued. In the northern seas the Powers sought to avoid the burdens of an extensive jurisdiction for neutrality and, at the same time, to retain the profits from their former extensive reserved fishings.<sup>(5)</sup> The conception of territorial sovereignty, with its necessary implications of definition of territory or area of jurisdiction, was probably then scarcely/

---

✓ (3) Moore. Digest. i.s. 144; Hyde, i.s. 141.

(4) Marsden. i. 356-7 & 487.

(5) Fulton. 567; Appendix 24.

scarcely developed. maritime boundaries were assigned in  
(6)  
particular places for particular purposes.

III. It was clear, however, that the opinions of jurists and the practice of States were disclosing an unanimity in favour of the restrictions of the claims to the marginal seas to a very narrow limit. The difficulty for maritime States was the absence of a natural boundary. The 'land kenning' was familiar in Scotland and in the Low Countries but there is no evidence that it was universally recognised. It was not, so it would appear, regarded as authoritative  
(7)  
in Scotland. In the case of Benton v Brink in 1757, it was argued that because a vessel had been taken within a German mile from a neutral Danish port the capture had been void but the Court did not see fit to take cognisance of the plea but proceeded upon another ground.

IV. The range of cannon had been advanced by the Dutch as  
(8)  
the limit in their disputes with England but it was not until the late eighteenth century that the recognition of this limit of cannon-range became somewhat general and then chiefly in the Mediterranean and in the treaties which  
(9)  
followed upon the Armed Neutrality of 1780. It was by no means/  
means/

---

(6) Fulton. 573;

(7) Morrison's Dictionary. p. 11949 (The decision proceeded on the principle that a competent foreign court having given a decision it could not be reviewed in a Scottish forum.

(8) Marsden i. p.487.

(9) Fulton. 571. Pistoye p.93. lists the treaties of this period and summarises the provisions.

means universally recognised. The limit of ten leagues, obviously unrelated to the range of cannon at that date, was adopted in a treaty (1784) between Spain and Tripoli. In such circumstances (10) Bynkershoek's aphorism, terrae dominium finitur ubi finitur armorum vis, (11) appeared to give the States a needed clue to a scientific limit to the waters which could be appropriated by the adjacent State. Standing alone the dictum was unsatisfactory, especially when it is recollected that perhaps the most lucrative of the Scottish fisheries on the west coast of Scotland were in parts where the shore was relatively uninhabited and least under the power and control of the government. Hautefeuille clarified the rule by adding that it is immaterial whether the coast be inhabited or not; the respect is due not to the risk of damage by cannon shot but out of respect to the territory of a friendly (12) people.

V. Vattel, whose influence, as noted, was very great in the American States and elsewhere, put the proposition more generally that, between nation and nation, the most reasonable rule which could be laid down was that the sovereignty of a State over its marginal waters extended as far as it (13) could be maintained affectively and for lawful ends. It was/

---

(10) Martens Recueil 2nd edn. iii. 760.

(11) Quaestiones etc. cap. viii; See also De Dominio etc. cap. II. p. 364 where he indicates cannon range.

(12) p. 417. (13) l. 23.s.289.

was probably due to the States acting upon this principle that the claims to the 'historic bays' came to be substantiated. In the French Wars, however, there was need for definite instructions to naval commanders and these were less concerned with bays than with the marginal seas which could not be so easily distinguished from the open sea. The lack of unanimity as to the extent of territorial (neutral) waters was reflected in the instructions of Jefferson, the American Secretary of State. He reserved the claim of the United States but, for the moment, he advised a conciliatory attitude, remarking:

"You are sensible that very different opinions and claims have been heretofore advanced on this subject. The greatest distance to which any respectable assent among nations has been at any time given, has been the extent of the human sight, estimated at upwards of twenty miles, and the smallest distance, I believe, claimed by any nation whatever, is the utmost range of a cannon ball, usually stated at one sea league.... The President gives instructions to the officers... to consider those heretofore given them restrained for the present to the distance of one sea league or three geographical miles from the seashore..."

Mr Jefferson, when President, considered extending the limit to the Gulf Stream but, apart from such an absurd proposal, the United States throughout the wars adhered to  
(14)  
the minimum three miles.

VI. The introduction of the three miles limit into the English law of Prize is usually ascribed to the opinions and decisions of Lord Stowell, then Sir William Scott, in various cases at this time, for instance the Anna,<sup>(15)</sup> where he accepted Bynkershoek's dictum as a rule of law and added that since the introduction of firearms that distance (cannon shot) had been  
✓ (14) Moore Digest, i.s.145. (15) 1805 5Rob. 373.



been usually recognised to be about three miles from the shore. Lord Stowell, himself was not too meticulous as to the measurement; (16) to this day the accuracy of three miles as the limit of cannon shot at that time is doubted. (17) Whatever, the origin of the three mile limit, possibly it was then regarded as ample for the protection of the coast, it was no doubt commended to mariners and the others interested by its simplicity and definition of 'cannon shot', a term essentially (18) vague and never satisfactory.

VII. It is important to note that it was not until a later date that the three mile limit was mentioned tentatively in the diplomatic negotiations in connection with the fishery problems which formed part of the legacy of the wars with the United States. In the negotiations between Britain and that country, the former offered the liberty of fishing to the American citizens on the Banks of Newfoundland and in the Gulf of St Lawrence and all the coasts belonging to Britain but at a distance of three leagues, except off the Island of Cape Breton where the limit proposed was fifteen leagues. Finally, however, the Americans were conceded (19) unrestricted fishing rights with only minor reservations.

VIII. The peace negotiations after the war of 1812-14 disclosed a firming of the British attitude and we find the British/

- 
- (16) 1800 3 Rob. 162; (17) League of Nations 351.(b).  
351(b) M. 145(b) 1930 V. Sir M Gwyer at p. 140.  
(18) Ortolan i. 158 and Halleck. i. 167.  
(19) Moore Digest. i.s.163 and Parl. Papers. (1910) Cmd. 5396  
pp. 7-14 for a construction of the treaties.

British Ministers pressing for a 'fair equivalent' of the fishery privilege. Lord Bathurst is reported to have said that while the British Government did not intend to interrupt American fishermen "in fishing anywhere in the open sea, or without the territorial jurisdiction, a marine league from the shore, it would not permit the vessels of the United States to fish within the creeks and close upon the shore of the British territories." (20) The resulting treaty of 1818 cannot be regarded as settling more than a dispute between two States which had much in common and which had been until recently united in a common allegiance. The legal issue was not so much the extent of territorial waters but whether the former exceptionally favourable treaty of 1783 had been abrogated by the war of 1812-14. Britain grew willing to concede more and the United States to take less. In the end the United States retained the right to fish anywhere on certain parts of the coasts but elsewhere they were excluded from the fishery within three miles from the shore. Britain had retained less than the minimum.

IX. The treaty of 1818 with the Reciprocity Treaty of 1854 were the principal instruments governing the fishery rights until 1870 by which time the agreement with the French as to the fisheries around the coasts of Britain and of France had been reached (21) giving a fresh orientation to the limits of territorial/

---

(20) See Appendix 18. (21) Appendix 28 (4).

territorial waters for this purpose. It is interesting, however, to note that the United States, in their dispute with the Argentine as to the sealing at the Falkland Islands, instructed their naval commanders and representatives to insist upon the right to hunt the seals up to the three miles limit and even inshore where the coast was uninhabited. The right was claimed on the ground of prescription but it bears a striking resemblance to the provisions of the treaty with Britain in 1818 ! On the British Government asserting sovereignty over the same islands they claimed against the United States the limit of three miles everywhere. (22)

X. The attempted exclusion of non-Russian nationals from the Behring Sea sealing area and the subsequent treaties indicate how unreliable was the treaty of 1818 as indicating that Britain and the U.S.A. regarded the limit of three miles for the reservation of the fishing as a settled rule of law. The Ukasse of Emperor Alexander in 1821 treated the Behring Sea as a mer fermée to the extent of closing the coastal waters for a distance of one hundred miles from the shore. The United States met the pretension by the pertinent remark that the sea at latitude 51°N was 4,000 miles broad and, in regard to the prohibition as to the approach to the coast, the American citizens would remain unmolested in the prosecution of their lawful commerce. In the subsequent American treaty of 1824 with Russia no limit was mentioned but, in the draft treaty/

(22) Moore Digest i. s.171 at pp 881 et seq. and 889.

treaty with Britain, the limit was stated at two leagues. The British Plenipotentiary at St Petersburg, however, when the terms of the American treaty became known, was instructed to omit the limit as immaterial: "The law of nations assigns the exclusive sovereignty of one league to each power on its own (23) coasts without any specific stipulation." The real reason for the omission was that the British Government feared the American treaty was more advantageous. There was no understanding on the part of the Russian and British governments as to the three miles limit. It was not mentioned by the British Plenipotentiary during the negotiations and the Russian Government, who had adopted the limit of cannon range in their instructions to their naval officers, declined to enter into (24) a supplementary declaration on the point.

XI. The American government appears to have adhered to the principle of the three mile limit, refusing to concede the (25) claim of Spain to a six miles belt around Cuba, until, after the cession of Alaska, the possible extermination of the seal industry and the protection of American interests aroused Congress to take action - and another view. An Act was passed applicable to all the dominions of the United States in the waters of the Behring Sea. About 1886 British ships were seized and penalised for sealing in contravention of the Statute, (26) though more than three miles from the shore. To the British protests/

(23) Parl. Papers. United States No.1. (1893) pp. 47 & 56.

(24) do. (1893) (C.6918) (C.6920) (C.6921).

(25) Moore Digest. i. 152. U.S.A. suggested to Britain a zone of five miles.

(26) Parl. Papers. United States No.4. (1893) (C.1821).



protests the United States advanced the plea of special circumstances on the analogy of the British claims over the pearl fisheries of Ceylon which were well outwith the ordinary (27) limit. The plea was absurd seeing that America had successfully resisted a similar claim on the part of Russia whose rights, with their limitations, the U.S.A. had obtained by cession. The terms of the reference to arbitration, Article 5, read, "Has the United States any right, and if so, what right of protection or property in the fur-seals frequenting the islands of the United States when such/seals are found outside the ordinary three mile limit?" The term 'ordinary' certainly describes the limit as between the parties to the case; its inclusion in the reference as an agreed fact precluded any consideration by the tribunal of what was the rule, (28) if any, of international law on the point.

XII. Internationally, it may be said that the United States considers the three mile limit as binding in the absence of a recognised rule of law. The Courts appear to have followed the Executive's lead in this matter. At first, they applied the three mile rule, but, when the seizures were made in the Behring Sea, they conveniently applied the Statute, forgetful, (29) for the moment of their former rule of the three mile limit. That/

(28) Nevertheless it was discussed indirectly. Parl. Papers United States (1893) No. 4. pp. 39 et seq.

(29) Parl. Papers do. and Nørlsen p. 448 for the arbitration awards. In the incident of the Sea Bride (1863) the U.S. claimed the 'cannon shot' was more than three miles but this was repudiated by Britain. Lawrence. p. 138.

That episode closed, they returned to their former practice, - the latest decision arising out of the Prohibition Act, (30) Cunard Steamship Co. v. Mellon will be discussed later.

XIII. The Scandinavian countries, including Denmark for this purpose, claim the width of their territorial waters to be one league but, being three German miles, it approximates to four geographic miles of sixty to the degree of latitude. In all probability both limits had their origin in convenience, the local standard of measure being preferred naturally in each case. (31) At one time Sweden appears to have claimed the narrower belt but the close connection with Norway caused Sweden to claim the like four miles. Denmark claims four miles against the Scandinavian countries probably on the basis of reciprocity, yet, in regard to fishing, in accordance with the North Sea Convention, claims against the signatories a limit of three miles only.

Norway, while admitting the three mile limit to be recognised, claims that geographical, historical and economic circumstances entitle the country to special consideration. The population being almost dependent on fishing, it would jeopardise their livelihood if the fishings around the coasts and in the fiords were opened further to all by a strict adherence to the limit of three miles. (32) It is much the same consideration/

---

(30) (1923) 262 U.S. 100. See p.

(31) See Fulton and Jessup passim; League of Nations C. 351 (b).M. 145(b) 1930 V; *Appendix 24*.

(32) League of Nations cit. sup. at p. 140 and 143. See Appendix 24 for the latest authoritative pronouncement.

consideration, the extension of the reserved waters which leads Norway to measure the distance from the furthest out rock at any time uncovered by the tide. Norway would appear to hold that the three miles rule applies to the coasts of Britain for, while not a party to the North Sea Convention, a protest was successfully lodged against the conviction of a Danish skipper of a Norwegian vessel for fishing just outwith the three mile limit in the Moray Firth. (33) Norway also resisted the proposed Russian limit of twelve miles. In the case of the Loekén, (34) (35) (36) Norway accepted the three mile limit for neutrality but insisted upon a reservation of her rights in the liquor treaty with the United States in 1924. (37) The British Government does not admit the claim of the Norwegian Government to a four mile limit or the method of determining the base lines as laid down in the Norwegian Royal decree of 1935 but would appear to be prepared to consider an agreement relating to fishery only. (38) Sweden is in much the same position as Norway. The German Prize Court, founding upon the fact that the Swedish Ordinance, fixing the limit of four miles for the purposes of neutrality, had not been recognised outside Scandinavia and that Britain had refused to admit the extension of territorial waters by the Argentine and Uruguay Governments beyond three miles, adhered/

(33) Mortensen v Peters (1906) 8 F.(J) 93; Hansard 4th Ser. (Commons) vol. 170 col. 472 and Appendix 24.

(34) Hansard (1923) Commons) Vol. 163. col. 960.

(35) (1918) T.L.R. See reference in Appendix 24.

(36) (1918) Cmd. 3121; Appendix 24.

(37) Jessup. 294. (Sweden also reserved rights)

(38) Letter from Foreign Office. Appendix 24.

adhered to the three mile limit in the cases of the Elida,  
 (39)  
 the Gefion, and the Dux. The French Council of Prizes, on  
 the other hand, in the Heina, was prepared to admit the Danish  
 (40)  
 rule of four miles had it been relevant to the case.

XIV. France, in this matter of the extent of territorial waters,  
 is distinguished by its inconsistency. Valin, in his Comment-  
 ary on the Marine Ordinances of France, gave six miles as the  
 (41)  
 limit and this was accepted by the U.S.A. as authoritative.  
 In the law of 1888, arising out of the North Sea Convention,  
 the fishery limit, not necessarily the limit of territorial  
 waters, was fixed at three miles. In 1800 it had been decreed  
 that captures made within half a league of the coast were  
 invalid but two leagues were to be the limit of asylum. In  
 1854 the cannon range was adopted to be changed to the three  
 miles in 1901. Again, the decree of October 18, 1912,  
 asserts that, for the purposes of Convention XIII of the Hague  
 Conference of 1907, the French territorial waters extend to  
 a limit of six marine miles. At the same time, instructions  
 were given that other limits claimed by States before the  
 (42)  
 commencement of any hostilities were to be respected. By a  
 decree of March 3, 1922, a limit of six miles was fixed for  
 reserved fishing, but presumably the rights of the signatory  
 States under the Convention of 1882 are still intact. The  
 point/

---

(39) Garner 225 & 226. (40) do. 226.

(41) Moore Digest. i.s.145. (42) Jessup. p. 18 et seq.



point is, France appears to have considered that the limits of territorial waters to be a matter for national determination and that different bounds may be adopted for different purposes.

XV. Portugal and Spain show a stubborn consistency in refusing to accept a limit of less than six miles. The claim of (43) Spain was resisted in respect of Cuba by both the United States and Britain. The latter has been most antagonistic to (44) the claims of Portugal. The Portuguese claim, like the Norwegian, is based on the fact that, owing to the very narrow continental shelf, the fishing areas off shore are so restricted that the exclusive reservation of almost the whole fishing (45) is necessary for the support of the coastal population. The recent civil war in Spain ought to have raised the question acutely as to the extent of waters which the British and other Powers were prepared to cede as territorial to Spain but no authoritative pronouncement on the subject has been made public. In so far as press reports of naval action can be founded upon the British appear to have taken the three mile limit as applicable but the circumstances are at the moment such that, even if that were the case, it cannot be deduced that the Spanish authorities voluntarily acquiesced in the practice of the British navy being in accordance with international law.

XVI. Some indication has already been given that the British view favours the three mile limit. It is favoured by all the leading/

---

(43) Moore, Digest, i.s.146. (44) Jessup 41.

(45) League of Nations, cit.sup. p. 137.

leading British publicists, e.g., Hall, Twiss, Phillimore,  
 (46) (47) (48)  
 (49) (50) (51) (52) (53)  
 Oppenheim, Lawrence, Westlake, Pitt Cobbett, and Birkenhead.

It is the view taken in the municipal courts of the extent of the Crown's jurisdiction where no other maritime limit is expressed in the statutes: it is the view adopted by the writers on the Law of Scotland: in fact, the three mile limit is nowhere else more favoured than in the United Kingdom, the United States, and Japan.

XVII. In regard to the decisions of the municipal courts, it may be remarked that many of the authorities advanced are merely dicta. Thus in the Leda Dr Lushington claimed that the term "United Kingdom" included the waters to a distance of three miles from the shore. In the Whitstable Fishery case, which dealt with possible damage to fishery beds from ships' anchors, it was said that the bed of the territorial sea was vested in the Crown, and Lord Chelmsford remarked:

"The three mile limit depends upon a rule of international law, by which every independent State is considered to have territorial property and jurisdiction in the sea which washes their coasts within an assumed distance of a cannon shot from the shore." (54)

(56)

The same view is expressed by Rankine as applicable in Scotland.

"It is a rule common to English and Scots Law that the ownership of the British Seas....within the limit (three miles) thus drawn, is vested in the Crown, both the water, with its products, and uses and the soil beneath it."

But/

(46) P.191. (48) Peace. p.292. (48) i., p.276.

(49) i. p.384. (50) P.138. (51) i. 1.189. (52) i. p.144.

(53) Pp.103-5. (54) Swa. Adm. 40.

(55) 11. H.L. Ca. 192. See also Hurst. 'Whose is the bed of the Sea' in B.Y.I.L. Vol. 4.

(56) Ch. XV.

But Rankine was relying upon dicta of Lord Wensleydale (57) in Gammell v Commissioners of Woods and Forests. That case did not deal with any question of international law but with the right of a subject to the salmon fishing along the open coast where stake nets could be fixed. In the case (58) of Lord Advocate v Clyde Navigation Trs. which dealt with the right of the Crown to interdict the deposit of dredgings from the Clyde in Loch Long, a mere two miles wide, there are dicta, expressly stated by the Lord Ordinary to be obiter, as to the territorial waters within the three mile belt on the open coast. These dicta appear to have been founded upon in subsequent pleadings and opinions as an authoritative statement of the breadth of the territorial waters of Scotland. They are not founded upon by the essayist as an expression of a rule of international law. Likewise the dictum of Lord Watson in Lord Advocate v Wemyss Trs. (59) is not in point.

"I see no reason to doubt that by the Law of Scotland the solum underlying the waters of the ocean, whether within the narrow seas, or from the coast outward to the three mile limit, and also the minerals beneath it, are vested in the Crown."

This case concerned coal seams underneath the Forth and not under the open sea. It resembles the issue which gave rise to the arbitration concerning the submarine minerals opposite the Duchy of Cornwall. The Cornwall Submarine Mines Act, 1858, passed to give effect to a recommendation of the/

---

(57) 3 Macq. (H.L.) 419 at 465.

(58) (1891) 19 R. 174. (59) (1900) A.C. 48 at p. 66.

arbitrator, did not profess to deal with an international law issue. It is suggested that these very definite opinions as to the three miles limit, while perhaps of some weight in questions arising in municipal law, have as yet no substantial authority as to the extent of territorial waters in international law.

XVIII. The three mile limit became important with the Fishery Convention with France in 1839 by Article IX of which the fishing was reserved for nationals within three miles of the shore. Other foreign fishermen were not affected: this Convention was unpopular with the Scottish fishing population who considered the restriction insufficient for their needs and as having been entered into especially to (60) favour the English south coast fishermen. Political expediency again driving, in 1848 the Board of Trade informed the Scottish Fishery Board that the Government did not recognise the right of any foreigner to fish within three miles from the Scottish coast. This declaration would appear to have been inconsistent with the charter granted to (61) the citizens of Bruges and the Treaty with Sweden in 1656. (62) This three mile limit has ever since been regarded as the minimum for reserved fisheries. A further convention was entered into with France in 1867 when the three mile limit (63) was readopted. This treaty was not ratified by France.

XIX./

---

(60) Fulton 609 et seq.

(61) See p. 91 and Fulton 616.

(62) Appendix 15.



XIX. Before the next fishery convention dealing with the North Sea was effected, the very important Territorial Waters Jurisdiction Act of 1878<sup>(64)</sup> was passed. The relevant portion<sup>(65)</sup> of the Act has been quoted already and it would be only reiterated here that the limit of the territorial waters claimed was purposely left undefined. As Lord Halsbury, who had charge of the Bill, said later:

"In that Act they took care specially to avoid any measurements. The distances were left at such limit as was necessary for the defence of the realm; then the exact distance was given for the particular purpose in view."

Lord Salisbury in the same debate said:

"Great care was taken not to name the three miles as the territorial limit."

Equally important was the declaration of the Lord Chancellor:

"He was far from saying that the three miles was to be the limit of territorial waters for all time. Originally the distance was fixed by gunshot, and it was always said that the distance a gun could fire to was three miles. How far this principle was to be extended, and whether it was to be extended indefinitely, was a question for consideration, and it was a question which would not be without difficulty." (66)

XX. From such declarations it may be deduced (a) that the limits in the fishery conventions before and after that date were to be considered as specified only for the particular purpose mentioned in the convention,<sup>(67)</sup> and (b) that generally the British Government preferred to retain an open mind on the subject.

XXI./

---

(63) Parl. Papers. (1882) Commercial. No. 24.

(64) 41 & 42 Vic. c. 73.

(65) See p. 175.

(66) Hansard 4th Ser. XXXIII. 504.

(67) See Appendix 24.

XXI. To return to the fishery conventions, the most important to date and still subsisting dealing with the Scottish waters is that of the North Sea Convention of 1882. Article 1 proceeds:

"The provisions of the present Convention, the object of which is to regulate the police of the fisheries in the North Sea outside territorial waters, shall apply to the subjects of the High Contracting parties." (68) ✓

Indirectly the convention thus defines the limits of territorial waters for the purposes of the convention since it had to define the limits within which the provisions were operative. So far as these related to the open coast of Scotland, the western boundaries of the North Sea were defined as follows:-

- (2) By the eastern coasts of England and Scotland;
- (3) By a straight line joining Duncansbay Head (Scotland) and the southern point of South Ronaldsha (Orkney Islands);
- (4) By the eastern coasts of the Orkney Islands;
- (5) By a straight line joining North Ronaldsha Light-house (Orkney Islands) and Sumburgh Head Light-house (Shetland Islands);
- (6) By the eastern coasts of the Shetland Islands;
- (7) By the meridian of North Unst Lighthouse (Shetland Islands) as far as the parallel of the 61st degree of latitude. ✓

Of the questions of international law discussed by the conference of delegates of the signatory Powers, only that of the limit of territorial waters is of present interest. The conference assumed that there was a belt of territorial waters and that the coastal State had the sole right of police jurisdiction therein and that the State was capable of enforcing it. In the preliminary draft convention submitted by/

✓ (68) The Convention is contained in the Sea Fisheries Act, 1883, 46 & 47 Vic. c. 22 Sch. 1, Art. 1.

by the British Government the limit of territorial waters was purposely left undefined; the other delegations insisted upon a definite measurement and the limit on the Scottish coasts was finally fixed at three miles east of the lines mentioned above. It was essentially a compromise and from the minutes it is clear that the conference was concerned with a limit of exclusive jurisdiction for the reservation and police of fisheries only. The contention that the Skägerack fisheries were purely national fisheries was rejected; the British delegation, now standing alone, accepted the French proposal of the three mile limit when the latter conceded, in part, the British claim to bays which the British, on principle, had desired to except from the convention. The important point in the discussion is that the British Government were reluctant to fix a definite limit of territorial waters but, when no alternative<sup>was</sup> offered, they accepted readily the three mile limit. (69) Too much importance, however, must not be attached to the fact that the limit adopted was a compromise. When the question was next under the joint consideration of the Powers, following on the conviction and release of Mortensen, a Danish skipper, for trawling in the Moray Firth, they entered into a further convention in 1908 pledging themselves to uphold and maintain the <sup>t</sup>status quo in the North Sea. (70) The limits of exclusive fishery, therefore were definitely determined as against the <sup>g</sup>signatory Powers.

XXII./

(69) Parl. Papers. (1882) Commercial No. 24. at pp. 13, 17  
47, 52 & 53. Appendix 25 for Map.  
(70) Appendix 29.



XXII. These signatory Powers were Great Britain, Germany, France, Belgium, Denmark and the Netherlands. Sweden and Norway, while participating in the negotiations declined to sign: they claim a four mile limit. This Convention is the latest and most important treaty delimiting the reserved fisheries around Scotland. The resulting position would appear to be that the signatory States are excluded from fishing within three miles of the eastern coasts of Scotland: elsewhere and for other purposes on the eastern side their rights are determined by international law generally. While the conventions with France of 1839 and 1867 state the fishing is to be free outwith the three mile limit along the whole of the coasts of either country for the nationals of the other, the application of the conventions to coasts other than on the North Sea is more than doubtful. As the compacts were for the purpose of regulating the police of the fisheries in the North Sea outside territorial waters, it cannot be held that the term 'whole of the coasts' should be extended beyond these shores which are relevant to the treaty. In any case, these earlier treaties would appear to be superseded by the Convention of 1882.

XXIII. In continuation of the policy of defining territorial waters for particular purposes only, there was inserted in the/

(71) See appendix 24. (72) See Article 2.

(73) This was the reason for the provision in the Herring Fishery (Scotland) Act, 1889, of scheduled areas on the west coasts for the regulation of trawling: Hansard. Vol. 337 p. 975. Belgium obtained a most favoured nation treaty in 1852 and is situated similarly to France.



(74)

the Merchant Shipping Act, 1894, a provision to the effect that a ship, which had wronged any British subject in any part of the world, if found in the territorial waters of the United Kingdom within three miles of the shore, might be arrested to found jurisdiction.

XXIV. The British Government appears more recently to have determined to advance the three mile limit as a principle of international law. (75) During the European War the three mile limit was insisted upon, subject to reservations, (76) against the Scandinavian States and it was recently stated in the House of Commons that Great Britain was not a party to any convention which contained a greater measurement of territorial waters than three miles. (77) Finally, in the treaties with Finland and the United States (78) it was stated that the parties adhered to the principle that three miles was the proper limit of territorial waters. In the Temporary Fisheries Agreement with the U.S.S.R., Soviet Russia (79) reserved the claim to extended territorial waters but admitted the British to the right of fishing up to three miles from the coast. It will be seen, therefore, that, wherever a limit has been fixed by Britain for particular purposes and claimed to be a limit of territorial as distinct from personal jurisdiction, the limit adopted has been three miles. (80)

XXV./

- (74) 57 & 58 Vic. c.60 s. 688. (75) Appendix 24.  
 (76) See Appendix 24. (77) Hansard 5th Ser. vol.320 p.1618  
 (78) Appendix 26. (79) Appendix 27.  
 (80) The statements made by the British Ministers of State are not always to be relied upon. For instance the statement that Britain has always maintained that by international/

XXV. While it would appear that the three mile limit has  
 (81)  
 the greatest support and might be accepted as the common  
 limit the successful opposition of other States at the  
 Conference for the Codification of International Law precludes  
 any assertion that it is a rule of international law.

XXVI. There is a minor problem arising from the attempts to  
 define the limit of territorial waters, viz., what is the  
 datum line from which the measurement is to be made? The  
 historic phrase 'from low water mark' is usually taken to  
 mean the low water of spring tides and probably there is no  
 (82)  
 substantial doubt on the point. Some states issue charts with  
 the line shown and this has the advantage of being defin-  
 itive where there are shifting shoals and the shore varies.  
 It is not known that such conditions prevail on any part  
 of the Scottish coasts. Doubtless the charts issued by  
 the Hydrographical Department of the Admiralty would be  
 accepted as authoritative evidence of the coast line at  
 any particular point.

XXVII./

---

(80) Contd. international law and practice the general  
 limit of territorial jurisdiction is three miles..".  
Hansard (1923) vol. 163 Col. 961. As shown above, the  
 three mile limit has been accepted by Britain only when  
 it became imperative to define a limit and then only  
 for a particular purpose; otherwise the policy of the  
 Government has been to decline a fixed limit for all  
 purposes. See the later case of The Fagernes (1927)  
 P.(A.C) 311.

(81) League of Nations C.351(b) M. 145(b) 1930.5.

(82) do. do. C. 230. M. 117 1930 V p. 11.

XXVII. Islands are regarded as part of the territory. Difficulties arose out of this in connection with the French agreement of 1839 but were remedied in the North Sea Convention of 1882. A more difficult point came before Lord Stowell in the case of The Anna where, on the principle of alluvium and increment, he held that mud banks resorted to for fowling and composed of debris and river deposits at the mouth of the Mississippi were to be considered as part of the territory and the three miles to be measured from that point. In the case of islands which lie outside the belt of territorial waters, as measured from the mainland, they draw to themselves a belt of territorial waters and in the case of an archipelago the distance is measured from the islands lying farthest out from the centre of the group.

XXVIII. Norway is distinguished not only as claiming a wider belt of territorial waters than usual but also in fixing the line seawards so as to include islets and wide fiords which separate them from the mainland. So unorthodox a method of measurement can only raise difficulties. Great Britain has declared the method to be "revolutionary" and has declined to recognise it: yet it is not novel or purely Norwegian for the United States in 1869 suggested that the territorial /

(83) Appendix 28(4). (84) (1805) 5 Rob. 373.

(85) R. v. The John J. Fulton (1917) 16 Exc. C.R. 331.

(86) Hyde 1. s. 143. For Orkney and other Scottish isles see Appendix 25.

(87) See Appendix 24.



territorial waters of Cuba might be measured from the  
 (88)  
 various islets or keys which surrounded the island.

XXIX. The datum line may be of some importance in connection with the Scottish lighthouses such as the Bell Rock, Dubh Artach, and the Skerryvore. The Bell Rock lighthouse is built upon rocks exposed at low tide at certain seasons and the Skerryvore and Dubh Artach upon rocks which are permanently exposed and situated well outwith the ordinary  
 (89)  
 three mile limit. Trawling is prohibited around Skerryvore and Dubh Artach but not around the Bell Rock, probably because the datum line adopted in the North Sea Convention, which applies to that area in which the Bell Rock lies, included islands but not rocks as was done in the later  
 (90)  
 convention regarding the Icelandic fisheries.

XXX. There is but little authority on the subject of lighthouses built on islets and that authority is conflicting. Wheaton  
 (91)  
 considers the claim to territorial waters around lighthouses reasonable though doubted. In a recent American case, decided in a lower Court, the plea of territoriality was rejected in the case of a beacon upon a rock wholly  
 (92)  
 submerged. The British view, and the instances of Skerryvore/

---

(88) Moore Digest. i. s. 146.

Parl. Papers. (1882) Commercial No. 24. re mud banks at mouth of the Elbe.

(89) The Bell Rock is about twelve miles east-south-east of Arbroath and the Skerryvore about the same distance south-west of Tiree. Dubh Artach is fifteen miles from Colonsay. (It is understood, unofficially, that the Scottish Fishery Board do not regard rocks exposed only at certain periods as islands on the ground that they are/



Skerryvore and Dubh Artach are consistent with it, was stated by Sir Charles Russell in the Behring Sea Arbitration as follows:

"I wish to point out that... if a lighthouse is built upon a rock or upon piles driven into the bed of the sea, it becomes, as far as that lighthouse is concerned, part of the territory of the nation which has created it, it has incident to it all the rights that belong to the protection of the territory - no more and no less... That point has never been doubted and if it were, there is ample authority to support it. The right to acquire by the construction of a lighthouse on a rock in the ocean a territorial right in respect of the space so occupied is undoubted." ((93)

Oppenheim and Westlake disagree with this categorical statement. The latter's ground is that it is not normally possible to fortify a lighthouse but admits that it is entitled to require that none should approach near enough (94) to cause damage. The ground of criticism is invalid: sand and other banks do not lend themselves to heavy fortifications but they nevertheless have to be taken into account in determining the datum line for the limit of territorial waters. Fauchille agrees simpliciter with Sir (95) (96) Charles Russell. Oppenheim would assimilate lighthouses to lightships. The purpose is the same but there is a difference between a lighthouse permanently fixed and a lightship which may be unmoored at will or drift from its moorings/

(89) Contd. are uninhabited but Skerryvore and Dubh Artach uninhabited except by lightkeepers!.)

(90) Parl. Papers. (1903) Cmd. 1530.

(91) 1. p. 369. (92) Jessup. 69

(93) 1. Moore Arbitrations 901. (94) 1. 393 and 1. 190.

(95) 1. 2. 130. (96) 1. 393.

moorings and station. It is merely a vessel riding at anchor and it has never been claimed that a lightship forms part of the territory of a State, though the territoriality of a ship may be a convenient fiction for some purposes. (97)

In all probability the opinion of Sir Charles Russell states the view correctly as to lighthouses. There is only one lightship in Scottish waters, the North Carr, stationed within three miles off the Fife Ness. In all probability the lightship would not be claimed to affect the datum line for the same reason as the Bell Rock and on account of the precedent in which it was declared that the Seven Stones Rock, a reef never uncovered and marked by a lightship, would not be regarded as within British territorial waters. (98)

XXXI. It is legitimate to enquire whether the territorial waters of a State may be extended and, if so, on what conditions. Hautefeuille, adopting the longest range of cannon as the limit of territorial waters, could, with propriety, at that time, hold that further extensions were not justified and were not legitimate. (99)

But the three miles limit no longer approximates to the range of guns. Spain claimed to extend the territorial waters pari passu with the increasing range of artillery but the right was denied by Britain and the United States. Today no States (100) claims/

(97) During the European War the British ships, Strathdene and West Point, the Norwegian ship Knutsen and the Dutch ship Blommersdijk were sunk near the Nantucket Lightship by German submarines. Wheaton, 1.369.

(98)/

claims that right. Several States at the Conference for  
 the Codification of International Law in 1930, on other  
 grounds, were strongly in favour of an extension of terri-  
 torial waters even beyond the six miles limit recommended  
 by the Institute of International Law in 1894. A number  
 of States have in fact made provision in their municipal  
 law which amounts to a substantial and recent extension  
 of their territorial waters. There are certainly practi-  
 cal grounds for an extension and possibly for a division  
 of territorial waters into zones for particular purposes.

XXXII. The British delegate at the Conference for the  
 Codification of International Law, stated that Britain  
 was against any extension of territorial waters beyond the  
 three mile limit but his Government would be prepared to  
 enter into treaties with other Powers to confer rights  
 in the open sea for specified purposes. An extension of  
 territorial waters would lay too onerous a burden upon a  
 neutral power. The British suggestion appears to indi-  
 cate the probable line of development with a view to  
 securing adequate protection to maritime States without  
 the burdens attendant upon territorial sovereignty. At  
 the/

---

(98) Hansard (1903) Com. Vol. 120. p. 679

(99) P. 20. (100) Moore Digest. i. s. 146.

(101) League of Nations. C. 230. M. 117. 1930. V.

(102) Institute of International Law P. 114.

(103) Fauchille. i. 2. p. 135.

(104) Revue 1925. p. 189. Treaty between Holland and  
 Mexico where three zones are distinguished: (a) zone  
 of sovereignty, (b) customs zone, (c) zone for fish-  
 ing and sanitation. It would seem that the first zone  
 is the only part constituting territorial waters.



the moment, preventive and protective action in the contiguous zone can be taken only with a due sense of responsibility and liability to account to the flag State.

(107)

The case of the S.S. Coguitlam is in point. It was held that the right to make a seizure in the contiguous zone implied (a) the evidence of certain facts which prima facie create liability to seizure, (b) facts which there is good reason to believe will be established though not yet actually proved, and (c) the doubt must be "as to the existence of the fact, not as to its wrongful character.

XXXIII. The three and the four mile limits now rest wholly upon use and wont and general recognition. These limits can be departed from only after due notice or special agreement. States are entitled to rely upon the continuance of a long established practice and any sudden alteration to their disadvantage would be good grounds for protest. It would appear to be the case that the British Government were unwilling to accept the recommendation of the Mackenzie Committee to close the Moray Firth against foreign trawlers because lucrative fishing areas elsewhere, e.g., in Iceland, would thereupon be closed to the British.

(109)

In/

(104) Contd. Revue 1927. 123 et seq. contains an excellent statement against the three mile limit.

(105) Cit. sup. (101). (106) Appendix 24.

(107) Nielsen. 450.

(108) Ortolan l. 112; Westlake l. 189; Hall . 192; Fiore ss. 272-3; Pitt Cobbett i. 135 & 143; Nielsen p. 534. Case of David J Adams.

(109) Report of the Scottish Departmental Committee on Trawling and Policing of Scottish Sea Fisheries pp. 32 and 56.



In brief, no State may, by unilateral action, extend its territorial waters without the consent, express or implied, of the other States interested in maintaining the status quo.  
(110)

## Section B.

### The Scottish Firths.

I. To a country, such as Scotland, where the coast is indented by large bays and estuaries and an important section of the community is dependent upon the fishing for their livelihood, the extent to which bays may be or are appropriated as territorial waters is important. This importance is enhanced when, by municipal legislation, the national is prohibited from trawling within large expanses of the bays, but the foreigner, not being subject to the jurisdiction if the waters are not territorial, suffers from no similar restriction unless prohibited by a treaty. The problem of the appropriation of bays has arisen in connection with the Norwegian fiords and the Icelandic bays. The decision of the Hague Permanent Court of International Justice in regard to the fishery rights of the United States in the bays and waters of Eastern Canada and Newfoundland is also germane to the issue. This essay is not primarily concerned with these non-Scottish waters but they are mentioned to show the issue is of international and economic interest./

interest.

II. The controversy as to the freedom of the seas did not touch bays of moderate size. The sailing ship, directing its course from headland to headland, was interested in bays as places of shelter, never refused in modern times, or as means of access to the ports which clustered the shores at the points of entrance of the hinterland. The question of the freedom of navigation in bays did not arise. On the other hand, the population along the shore was particularly interested in the maintenance of the peace of the waters and the conservation of their means of livelihood. The State was further interested in the bays as forming an aisle into the vulnerable heart of the country. As a result, as was recently said:

"The individual State has, in practice, enjoyed much latitude in determining what bays or arms of the sea penetrating its territory may be regarded as a part of the national domain and dealt with accordingly." (1)

So much have gulfs and bays been held to be part of the national territory that they have been described as national waters in contradistinction to territorial waters of the marginal sea. This conception of a special status of bays is supported by the adoption of a special datum line, either a line across the mouth of the bay or between the points nearest the entrance where the shores converge to a stated width. Within the line the waters are termed 'national', outwith the line or seawards, 'territorial'.<sup>(3)</sup>

III./

(1) Hyde i. s. 146.

(2) Hurst. B.Y.I.E. Vol. III. 'The Territoriality of Bays.'

(3) Appendix. 29 (2), (3) & (4).

III. Generally, however, the questions which have arisen ~~as to~~ as to bays fall into three classes; (a) the reservation of fisheries, (b) the violation of neutrality; and (c) the invocation of the criminal or civil jurisdiction of the Courts of the adjacent State. In every case there is present the preliminary issue of whether the bay has been appropriated as territorial. Apart from historic bays, that issue turns upon the extent of size of bays which may be held as appropriated.

IV. Upon this point there is no rule of international law.

As it was put in the Direct United States Cable Co. v

Anglo- American Telegraph Company and quoted with approval  
(4)  
(5)

in Mortensen v Peters:

"It does not appear to their Lordships that jurists and writers are agreed what are the rules as to dimensions and configuration, which, apart from other considerations, would lead to the conclusion that a bay is or is not a part of the territory of the State possessing the adjoining coasts; and it has never, that they can find, been made the ground for judicial determination."

Criteria were suggested by the tribunal in the North

(6)

Atlantic Fisheries Arbitration as follows:  
into

"The interpretation must take account all the individual circumstances, which for any of the different bays are to be appreciated, the relation of its width to the length of penetration inland; the possibility and the necessity of its being defended by the State in whose territory it is indented; the special value it has for the industry of the/

(4) (1877) 2 A.C. 394 at 420.

(5) (1906) 8 F. (J) 93. Hurst in B.Y.I.L. (1922-23) considered there was no dubiety about the British practice but his article was written before the case of the Fagernes /1927/ P.(C.A.) 311.

(6) North Atlantic Coast Fisheries Arbitration (1930) Cmd. 5396 Mis. No. 3.

the inhabitants of its shores; the distance which it is secluded from the highways of nations on the open sea and other circumstances not possible to enumerate in general."

V. The earliest jurists distinguished bays according to their size, the larger they assimilated to the open sea, the smaller they held to appertain to the State whose shore enclosed them. The classification was too vague<sup>(7)</sup> as no definite measurement was indicated to determine the division between the small and the large bays. Vattel enquired whether the entrance could be defended. Hale, an English jurist, asserted<sup>(8)</sup> the factor of visibility of opposite headland. Defensibility depended upon the range of cannon, an indefinite distance, and visibility varied from day to day and hour to hour as well as with the human factor,<sup>(9)</sup> Ortolan, more precise, adopted twice cannon shot distance of three miles as the maximum width of bays which could be appropriated. The majority of jurists have followed the ratio of Ortolan in this matter, adopting double their proposed limit of the territorial marginal sea as their proposed maximum limit for the appropriation of bays.<sup>(10)</sup> Some writers, e.g., Oppenheim, Lawrence,<sup>(11)</sup> Westlake,<sup>(12)</sup> Hall,<sup>(13)</sup> Birkenhead,<sup>(14)</sup> Wheaton,<sup>(15)</sup> and Hyde,<sup>(16)</sup> even if they suggest a limit, take the view that the question of what bays are, or may be appropriated is not settled by law. It is even doubtful whether all the bays which have been claimed as appropriated/<sup>(17)</sup>

(7) Bk. I. XXIII. s. 291. (8) De jure maris etc. IV.

(9) l. p. 143. (10) Fauchille l. 2. 373; Westlake l. 191 & 203; Fiore s. 275.

(11) l. 398. (12) p. 140. (13) l. 191 & 203.

(14) pp. 193 & 197. (15) P. 105. (16) l. p. 367.

(17) l. s. 146.



appropriated in the past would now be so regarded.<sup>(18)</sup>  
 generally, defensibility is a criterion with most jurists,  
 but even that is not final and conclusive.

"It is only in the case of a true gulf that the possibility of occupation can be so real as to furnish a valid ground for the assumption of sovereignty, and even in that case the geographical features which may warrant the assumption are too incapable of exact definition to allow the claim being brought to any other test than that of accepted usage."<sup>(19)</sup>

VI. "Accepted usage" is undoubted in the case of the historic bays, that is those which have long been recognised as appropriated. But these bays are few and the jurist and the statesman must legislate for the general as well as for the particular. It is this necessity for a general rule which has given birth to suggested limits of double the width of the territorial marginal sea as determining the extent to which bays may be claimed as territorial. Such a rule, being merely an application of the limit of territorial waters following the sinuosities of the coast, disregards the very special national interests in these waters and there must be an extension. Recognition of this need is the justification of the arbitrary limit of ten miles as a datum line which was adopted in the French Fishery Conventions, the North Sea Convention,<sup>(20)</sup> the treaty of 1901 with Denmark as to the Icelandic fisheries,<sup>(21)</sup> and applied in the award of the Permanent Court/<sup>(22)</sup>

(18) Hall pp. 193 & 197. The Fagernes /1927/P (C.A.) 311. in re the Bristol Channel.

(19) Westlake l. 192. De Latour. l. 385 "Le mot golfe est très vague"

(20) Appendix 28(2)(a) & (3). (21) do. (4).

(22) (1903) Cmd. 1530.

International Court of Arbitration in the North Atlantic  
(23)  
Fisheries case.

VII. The practice of States in the appropriation of bays has varied and it is this variation and present uncertainty which lies at the root of the difficulty of jurists in attaining a degree of unanimity.

VIII. The history of the development of the law as to the British Bays may be dated from the proclamation of James I in 1604 claiming the King's Chambers as neutral waters within his sovereign jurisdiction. These bays or chambers were delimited by drawing ideal lines from headland to headland  
(24)  
around the coast. This proclamation contained the first authoritative claim to the sovereignty over the bays defined according to the 'headland' theory. So moderate were the claims in those times that no objection was raised by other States:  
(25)  
indeed, they were recognised as competent by the Dutch. The  
(26)  
same idea is expressed by Stair as the law of Scotland:

"The vast ocean is common to all mankind as to navigation and fishing, which are the only uses thereof, because it is not capable of bounds; but when the sea is enclosed, in bays, creeks, or otherwise is capable of any bounds/

---

(23) Parl. Papers Miscell. No. 3 (1910) Cmd. 5396. p. 22.

(24) De Latour describes these claims as 'pretensions' L. 1.386.  
See also Fulton. p. 123 for map.

(25) Marsden l. 487. The Hollanders contended that by the Law of Nations no prince could challenge further into the sea than he could command with a cannon, except gulfs within their land from one point to another.

(26) II. I. 5.

bounds or meiths, as within the points of such lands, or within view of such shores, then it may become proper, but with the reservation of passage for commerce, as in the land."

(27)

Bell, in his Principles, is less precise:

"The sovereign.... is proprietor of the narrow seas within cannon shot of the land and the firths, gulfs and bays round the kingdom."

IX. The corresponding provision in the English Common Law is (28)  
attributed to Lord Hale in his De Jure Maris.

"That arm or branch of the sea which lies within the fauces terrae where a man may reasonably discern between shore and shore, is or at least may be, within the body of a county and therefore within the jurisdiction of the sheriff or coroner".

Although Hale's principle has been approved in cases before (29)  
the Courts, it cannot be held to have represented a principle of international law in the late eighteenth century or to have covered the King's Chambers, such as the Bristol Channel stretching from Lands End to Milford Haven. Stair represented more properly the practice of States in that early period and Stair was preferred in the case of Mortensen v Peters. in (30)  
1908.

X. In the Treaty of Paris of 1763 there was special provision allowing the French to fish within three leagues of the coast of the Gulf of St Lawrence. This has been regarded by Pauchille as proving that at that time the Gulf of St Lawrence (31)  
formed part of the British territory. In 1780 Denmark declared/

✓ (27) Sec. 639.

✓ (28) 1. c.4. This principle of Hale has been held by Hurst (B.Y.I.L. Vol. III.) as being definitive of the law on the subject but it is suggested that the principle stated has reference primarily to the jurisdiction of English institutions which were not comparable with their Scottish/



(32)

declared the Baltic a closed sea; in 1794 Sweden and Denmark agreed and bound themselves to preserve the peace of the

(33)

Baltic as a closed sea. The Russian Tzars always regarded the Gulf of Riga and the Gulf of Finland as territorial

(34)

waters. Today, U.S.S.R. claims wide bays in the Arctic Ocean as territorial waters and has sustained the claim against the

British Government who perforce have attained their end by temporary agreements as to the limits of reserved fishing

(35)

grounds and navigation. In 1906 Italy legislated for the

(36)

territoriality of bays of twenty miles at their entrance.

(37)

Norway claims the Varanger Fiord, 32 miles wide. Passing to

America, Hudson Bay is claimed by Canada, though that claim

(38)

is disputed by the United States. In all probability the

claim is well founded, as, by the treaty of 1815, the fishing rights conceded to the United States citizens were expressly

without prejudice as to the exclusive rights of the Hudson

(39)

Bay Company. Owing to the little amount of the shipping in

the Bay, the question has not yet been acutely raised and

the issue, therefore, must be held to be unsettled. Finally,

there are the instances of the historic bays of varied extent

which have been admitted as territorial waters. These

instances/

(28) Contd. Scottish counterparts. The Scottish Courts, including the Admiralty Court, exercised a jurisdiction mainly customary and not founded upon statute as in England. The principle is now merely of historical interest. See e.g., Appendix 28(1).

(29) See Hurst cit. sup. (30) (1906) 8 F.(J) 93.

(31) Fauchille 1.2.375. (32) De Martens Rec. 2<sup>o</sup> Ser. iii. 175.

(33) De Martens Rec. 2<sup>o</sup> Ser. v. 606. (34) Fauchille 1.2.379.

(35) Appendices 21 & 27.

(36) Fauchille cit. sup. and re declaration by Italy in 1914 see Wheaton 1. 365.

(37) Appendix 24. (38) Wheaton 1. 365.



instances, it is suggested, would point to the decision of  
 (40)  
 the High Court of Justiciary in *Mortensen v Peters*, which,  
 although reached upon other grounds, treated the Moray Firth  
 as territorial waters, being consistent with previous inter-  
 pretations of international law.

XI. However diverse the practice of nations has been, and  
 is, the British view can now be ascertained and regarded as  
 settled within limits from a review of the international  
 issues which have arisen within comparatively recent times  
 in connection with the fisheries in the North Sea and in the  
 North-west Atlantic and the historic bays. These bays are  
 Delaware and Chesapeake Bays claimed by the United States,  
 and the St George's Channel, Bristol Channel, Conception  
 Bay, Bay of Chaleurs and Miramichi Bay claimed by Britain.

XII. The case for the historic bay rests upon the former  
 general power of States to appropriate the bays around the  
 coast and to exercise the right of sovereignty thereon. So  
 far as the claims may now subsist, they must be regarded as  
 (41)  
 relics of a former age. It has been argued that there must  
 have been specific and indubitable acts of appropriation  
 on the part of the State and, the writer would add, acqui-  
 escence, express or tacit, on the part of other States in bar  
 to/

---

( 39) Appendix 18 and B.Y.I.L. vol.XV.

(40) (1906) 8 F.(J) 93.

(41) Mr Root before the North Atlantic Fisheries Tribunal.  
Jessup 370 et seq.

to objection on their part to the appropriation. The jurisdiction in the King's Chambers was in former times effectively exercised. (42) Kent claimed very extensive stretches of waters for the United States by application of the headland principle but the claim was too extravagant and his opinion has not been endorsed either by the practice of the United States or by subsequent American writers. (43) The action of the British executive in cancelling the effect of the conviction by the Court in the case of Mortensen (44) and the declaration by the Attorney General in the case of the Fagernes (45) that sovereignty would not now be claimed over the Bristol Channel would appear to confirm the opinion of Hall that the Crown would not now claim the King's Chambers as within its sovereignty. (46)

XIII. There are three well known American historic bays. In the case of the Grange it was held that Delaware Bay did not belong to the United States. (47) The bay is only ten miles wide and in all probability would even now be accorded to the United States although the United States Attorney based his pleas upon the opinions of the older publicists. (48) Chesapeake Bay, twelve miles wide, was held in the case of the Alleganean to belong to America. (49) The most important case decided in a British/

(42) Wardens 1. p.484 and 11. 242-3; Direct United States Cable Co. v. Anglo-American Telegraph Co. (1877) 2 A.C. 39.

(43) Commentaries 1. 29 & 30. Jessup. p.359 considers that undue weight has been attached to the opinion of Kent on this matter. (44) (1906) 8 F.(J). 93.

(45) 1927 P. (C.A.) 311.

(46) P. 194; see also Pitt Cobbett 1. 148.

(47) Moore Digest. 1. p.735; Moore Adjudications vol.4. p.130.

(48) Wheaton 1. 366. (49) Moore Digest. 1.s. 153.

(50) Moore Digest. 1. s.153.

British Court related to Conception Bay in Newfoundland. This bay is about fifteen miles wide. In the case the authorities in the Law of Nations and the Common Law of England were examined and reviewed. (51) After noting that there appeared to be no unanimity among text writers and jurists as to the dimensions and configuration which would lead to the conclusion that a bay is or is not part of the territory of the adjoining State, (52) the opinion proceeded:-

"It seems to (their Lordships) that, in point of fact, the British Government has for a long period exercised dominion over this bay and that their claim has been acquiesced in by other nations, so as to show that the bay has been for a long time occupied exclusively by Great Britain, a very circumstance which in the tribunals of any country would be important. And moreover (which in a British tribunal is conclusive) the British legislature has by Acts of Parliament declared it to be part of the British territory, and part of the country made subject to the Legislature of Newfoundland."

XIV. Contemporaneous with these decisions which have led to these bays being classed as historic, there was a counter tendency to restrict the claims to limited areas in the larger bays in the matter of the exclusive right of fishery. In the conventions with France in 1839 and 1867, the datum line for the bays of less than ten miles width at the entrance was taken to be the line joining the headlands. The North Sea Convention of 1882 followed this as a precedent but is more precise as to the larger bays: (53)

"As regards bays, the distance of three miles shall be measured from a straight line drawn across the bays, in that part/

(51) Direct United States Cable Co. v Anglo-American Telegraph Co. (1877) 2 A.C. 394 at 420.

(52) See ante p.211

(53) Appendix 28 (2), (3) and (4) and also (1903) Cmd. 1530 - Treaty with Denmark re Icelandic fisheries.



part nearest the entrance, at the first point where the width does not exceed ten miles."

This was a compromise between the French proposal that the boundary of territorial waters should follow the sinuosities of the coast except in bays with an entrance of less than ten miles width and the British proposal to omit all bays from the convention on grounds of principle. The provision of the convention did not state a rule of international law.

XV. This policy of restriction of the limits of exclusive fishery rights in bays was occasionally followed by Britain in the dispute with the United States as to the interpretation of the Treaty of 1818. The tribunal which arbitrated upon this vexed question was called upon to lay down rules for the guidance of the parties for the determination of the bays for which the award did not expressly provide. They were aware of the difficulties of the situation for they declared that:

"Admittedly the geographical character of a bay contains conditions which concern the interests of the territorial sovereign in a more intimate and important extent than do those connected with the open coast. Thus conditions of national and territorial integrity, of defence, of commerce and of industry are all vitally concerned with the control of the bays penetrating the national coast line. This interest varies, speaking generally, in proportion to the penetration inland of the bay; but...no principle of international law recognises any specific relation between the concavity of the bay and the requirements for control by the territorial sovereignty." (56)

The tribunal adopted<sup>as</sup> the general principle the rule that the three mile limit should follow the sinuosities of the coast/

(54) Parl. Papers. (1882) Commercial No. 24.

(55) Moore Digest. 1. s.149. For the diplomatic correspondence see Moore Digest. 1. s.165; Fauchille. 1.2. 373-8.

For award see Parl. Papers. (1910) Cmd. 5396.

(56) (1910) Cmd. 5396. p.20.



coast and in the case of bays should be measured from a straight line across the body of water at the place where it ceased to have the configuration of a bay. To apply this principle to the case before them, the tribunal adverted to the various treaties into which Britain had entered with the European Powers where the ten mile rule for bays had been adopted. The tribunal also considered that there was evidence that a similar rule had already been followed by the parties to the case, Great Britain and the U.S.A. It was declared that:

"Though these circumstances are not sufficient to constitute this a rule of international law, it seems reasonable to propose this rule with certain exceptions, all the more that this rule with such exceptions, has already formed the basis of an agreement between the two Powers."(57)

XVI. In the meantime the issue of the territoriality of bays was raised in connection with the prohibition of trawling in the Moray Firth. While the North Sea and the other conventions specified the limits of the exclusive right of fishery on the east coast of Scotland, it did not follow that these limits were coincident with the boundaries of territorial waters. (58)

France and Denmark, as was noted, do not regard them as coincident and have adopted other limits for other purposes against the signatory Powers. Although the executive took a different view, the British legislature appeared to be of the same mind for, by section 7 of the Herring Fishery (Scotland) Act, (59)

(57) Parl. Papers. (1910) Cmd. 5396 p. 22.

(58) Mortensen v Peters. (1906) 8 F.(J) 93. For general resume of the controversy see Mackenzie Commission Report. Chap. VI. (59) See ante pp. 190 and 192

(60) 52 & 53 Vict. c. 23. The executive denied that this or similar legislation had ever been enforced against foreigner- Behring Sea Arbitration, Parl. Papers United States/

(60)  
 Act, 1889, the Fishery Board for Scotland were empowered to close for trawling the whole of the Moray Firth inshore of a line drawn from Duncansbay Head to Rattray Point, a distance of 72 miles. The necessary byelaw was made and confirmed in 1892. (61)  
 Beyond the limits of the reserved fishing grounds and within the limits of territorial waters, if they extended beyond the limits in the conventions, the territorial State retained the right to legislate for fisheries so long as the legislation was reasonable and not biased against foreigner protected by treaty. Nor was the legislation contrary to international law. Each signatory to the Convention had been notified of the action of the Fishery Board; none had demurred and all had tacitly accepted and respected it. Norway was not a signatory to the Convention and several Grimsby-owned trawlers, to avoid the restrictions imposed by the Convention and the municipal law had registered in that country. For years before 1906 there had been no trawlers in the Moray Firth except the pseudo-Grimsby trawlers. (62)  
 It may therefore be concluded that the legislation was competent and not contrary to (63)  
 the existing treaties.

XVII. In 1906 a Danish skipper of a pseudo-Grimsby trawler registered in Norway was convicted of an offence under the byelaw referred to above in that he has trawled at a point five miles east by north of Lossiemouth and outwith one marine league/

---

(60) Contd. States (No.4) (1893) pp. 51 & 56 et seq.

(61) Appendix 28 (6).

(62) The Mackenzie Commission Report Ch. VI. contains a detailed account of the events leading up to and subsequent to the conviction of Mortensen.

(63) C.f. Oppenheim l. 398.

league but within then miles of the adjacent coast. Norway lodged a formal protest against the jurisdiction of the Court and the case was appealed to the High Court of Justiciary. The question to the Court was whether, having regard to the provisions of the Sea Fishery Regulations (Scotland) Act, 1895, (64) section 10, the conviction and sentence imposed were legal and competent. The Bench were unanimous<sup>u v s.</sup> in deciding to uphold the jurisdiction of the inferior Court. The statute standing, the competence of the legislature or the validity of the statute could not be canvassed in that Court as contrary to law.

"It is trite observation that there is no such thing as a standard of international law extraneous to the domestic law of a kingdom, to which appeal can be made. International law, as far as this Court is concerned, is the body of doctrine regarding the international rights and duties of States which has been adopted and made part of the Law of Scotland" (65)

It was equally clear from the opinions that, after a consideration of the authorities, the Court held the Moray Firth exhibited all the characteristics which distinguished a territorial bay.

Lord Justice General, "I cannot say that there is any definition of what fauces terrae exactly are" (66)

(67)

Nevertheless, founding upon Stair, he had no difficulty in holding that the Moray Firth was within the latter's definition of the territory of the State.

(68)

Lord Kyllachy remarked:

"It, /

(64) Appendix 28(5). Quoted in S.S. Cristina [1938] A.C. 497

(65) L.J. General Macdonald. (1906) 8 F.(J) 93 at p. 101. A

(66) do. do at p.102.

(67) II. I. 5.

(68) (1906) 8 F. (J) 93 at p. 105.



"It, however, seems to me vain to suggest that according to international law there is any part of the Moray Firth which is simply an area of open sea... For prima facie at least, the whole Firth is, as its name bears, a 'bay' or 'estuary' formed by two well marked headlands, and stretching inwards for many miles into the heart of the country."

In all probability, had the executive not intervened, this decision of the Court would have classed the Moray Firth as an historic bay.

"C'est l'acquiescement de certains états à la réclamation de souveraineté élevée sur ces baies par la nation riveraine et l'absence de protestation des autres états contre cette réclamation qui en ont fait des baies historiques et leur ont donné le caractère territorial." (69)

XVIII. There was certainly evidence of acquiescence on the part of the signatory States to the North Sea Convention and Norway protested upon a technicality in circumstances where the comity of nations might have dictated another course. To some extent Norway acquiesced in the wisdom of the closure of the Firth to trawling as that State intimated that, in future vessels need not expect support if arrested for trawling in the Moray Firth. (70) The reasons advanced for the executive's upholding the protest was that Britain had always insisted upon the three mile limit for territorial waters and that to claim a more extensive jurisdiction against foreigners would lead to claims for reciprocity elsewhere.

---

(69) Fauchille. 1.2.381.

(70) Hansard 4th Ser. Vol. 170 p. 472.

(71) do. vol. 191. p. 1745 et seq.  
Mackenzie Commission Report. p. 26.



(71)  
elsewhere.

The view of the government departments concerned in territorial waters was stated by the Under Secretary of State for Foreign Affairs:

"Apart from special treaties territorial waters comprise (a) the waters which extended from the coast line of any part of the territory of a State to three miles from low water mark of such coast line; (b) the waters of bays, the entrance to which is not more than six miles in width, and of which the entire land boundary forms part of the territory of the State. However, by custom, by treaty and by special convention, the six miles limit has been extended to more than six miles."

However, the application of the rule as stated to bays was  
(72) later denied. The 'ten mile' rule adopted in the North Sea Convention for the reservation of fisheries in the bays has been objected to by Britain as a surrender of fishing rights  
(73) and as contrary to the law of nations. The remedial measure,  
(74) the Trawling in Prohibited Areas Protection Act, 1909, merely prohibited the landing in British ports of fish taken by foreign trawlers in those areas where that method of fishing was forbidden to the natives: it did not interfere with the foreigner with any right he may have to fish there. In this remedy there is conclusive evidence that the British Government did not consider they had the power to regulate the fishing beyond the narrowest possible limits except where the treaty conferred the power.

XIX/

---

(71) *ibid.* (as previous page)

(72) Do. 4th Ser. vol. 169 p.989.

(73) Parl. Papers. (1882) Commercial No. 24.

(74) 9 Edw.7. c.8.

XIX. As confirming this conclusion, notice may be taken of  
 (75)  
 the collision case of the Fagernes. The locus was at a point in the Bristol Channel about  $10\frac{1}{2}$  or  $12\frac{1}{2}$  miles from the English coast and  $9\frac{1}{2}$  or  $7\frac{1}{2}$  miles from the Welsh coast. The Bristol Channel at that point was about twenty miles wide and had been included in one of the King's Chambers. On being pressed by the Court to say whether the locus was within the area claimed to be within the territorial sovereignty of the Crown, the Attorney General stated that he was authorised to affirm that the spot where the collision was alleged to have occurred, was not within the limits to which the territorial  
 (76)  
 sovereignty of His Majesty extended.

XX. There has been no authoritative declaration by the British Government as to the specific rules which they would apply or do apply to determine what bays or to what extent the larger bays around the British coasts are regarded as territorial. The King's Regulations and the Admiralty Instructions of 1899 declared that territorial waters included the ports, harbours, bays and mouths of rivers and adjacent parts of the sea enclosed by headlands belonging to the same State, but this declaration was dropped in the 1904, 1913, and 1926  
 (77)  
 editions. The term 'territorial waters' was used in the regulations framed under the Defence of the Realm Act, 1914,  
 (78)  
 but nowhere is it defined. Neither is the term defined in what is popularly known as the Nyon Agreement for the combating of piracy in the Mediterranean in 1937.  
 (79)

XXI./

(75) 1927 P.(C.A) 311. (76) Do. at p. 319.  
 (77) B.Y.I.L. (1928) p. 123. (78) Manual of the Defence of the Realm Act.

XXI. In this matter of bays, as in the case of the marginal sea, it must be taken that the question has not yet been authoritatively settled. Having regard, however, to the action taken by the executive government in the Moray Firth case and to the declaration by the Attorney General in the Bristol Channel case, conjoined with the policy as to the marginal sea, it would appear to be an inevitable inference that British policy is now in favour of very restricted territorial waters, both in the marginal sea and in bays. What these limits are is more difficult to say, but it would seem from the many shifts and hedgings of the issue to be that only the minimum accepted by States would now be regarded as satisfactory by Britain, viz., the three mile limit for the marginal sea and the six mile datum line for bays. A more extensive jurisdiction for particular purposes is only to be obtained by express convention. If this conclusion is correct, (the practice of States elsewhere shows that it does not constitute a rule of international law) then the Firth of Forth, the Firth of Tay, the Moray Firth and the Firth of Clyde, except in their upper reaches, cannot be regarded as territorial. In view of the action taken in the Moray Firth case and the Bristol Channel case, another State might well, should question arise, assert that Britain is 'personally barred' from asserting exclusive sovereignty over these firths or other Scottish firths beyond the minimum of territorial waters as determined by the six mile rule.

## CHAPTER V.

State Jurisdiction in Territorial Waters in time of  
Peace.

(1)

I. The conclusion reached in a previous chapter that the littoral States possesses, upon its territorial waters, the exclusive right of sovereignty, restricted in the exercise thereof only by the rules of international law. This jurisdiction comprehends the measures for the protection of the State, the interests of the citizens (and ressortissants), and commerce: (2) it is an exclusive jurisdiction as regards 'mere matters of police and control'. Thus the State may regulate pilotage, make regulations for customs and sanitary matters, laws concerning stranded goods and the like. (3) It is not possible, however, to compile an exhaustive list of the functions of the State in territorial waters nor is it necessary, having regard to the juridical status of these waters, if the essayist's conclusion is sound. The sum total of the functions and rights of the State are those remaining open by international law to the State as a sovereign power. It may be pointed out, however, that the powers are seldom prominently displayed; the tendency is to hold the jurisdiction in reserve and to accord the utmost freedom consistent with the well-being of the State and its subjects. (4)

II. The restrictions upon the territorial sovereignty of the littoral/

(1) Ch. III. (2) Fiore ss. 265 & 266.

(3) Oppenheim 1. 386. See also Fauchille. 1. 2.1092.

(4) See, for instance, the Convention as to the International Regime for Maritime Ports. (1925) Cmd. 2419.



littoral State, imposed in the interests of the community of States, are but the recognition of the fact that the territorial waters form a physical part of the high seas and frequently a portion of the great ocean highway of international commerce; the innocent use of these waters is not antagonistic to the local interest and ~~in~~ in no way imposes a burden upon the territorial sovereign. Accordingly, while it is a moot point as to the extent to which passing vessels are subject in practice to the territorial jurisdiction, it is now clear that the territorial sovereign may not levy dues of passage or other charges except for specific services rendered to the ship itself.

III. A distinction has been drawn between 'jurisdiction', meaning subjection to the local courts, and 'control', implying subjection to the regulations of the executive and administrative departments of government. Territorial waters have also been divided into zones for different purposes, e.g., customs and sanitation. These, however, are but expedients to cloak with a show of authority invalid attempts to extend the limits of territorial waters. The protective acts of the sovereign outwith territorial waters cannot purport to be the exercise of a territorial jurisdiction. The distinction between 'jurisdiction' and 'control' is unnecessary and misleading. A sovereign territorial jurisdiction postulates the power to legis-

(5) Oppenheim l. 387. League of Nations C. 230 M.117. 1930.pp.6&7

(6) Jessup. xxxii.

(7) See ante. pp.192 & 207. Fiore s. 306 makes a legitimate proposal for the demarcation of zones for criminal jurisdiction. C.f. Treaty of Helsingfors of 19th August, 1925, between the Baltic States. De Warentens Nouv. Rec. 3 Ser. 131 and /

legislate for and to control all persons within the area of jurisdiction. The form of the control, the sanctions to be applied and the manner of their application must be left to the discretion of the State, subject only to the dictates of international law and the comity of nations. (8) The jurisdiction upon territorial waters is not, in essentials, different from the jurisdiction on land.

IV. It is not a question of the right of the State to exercise the jurisdiction in the territorial maritime belt but whether it is expedient to do so in all the circumstances. This proposition is well founded.

"As a general rule, the jurisdiction of a nation is exclusive and absolute within its own territories, of which harbours and waters are as clearly a part as the land. Restrictions may be imposed upon it by treaties and a few have been yielded by common consent, and thus have come to be regarded as rules of international law.... Circumstances might render it proper to forego the exercise of the right....but still the right would exist, and it would be at our option to yield or enforce the exercise of it." (9)

(10)

The same idea was expressed in the case of the Belgenland.

V. In Britain and France the matter is regulated by municipal law. The controlling British statute, the Territorial Waters Jurisdiction Act, 1878, which has been referred to already, (11) authorises the exercise of a criminal jurisdiction in respect of offences committed within the British territorial waters. Bays are/

(7) Contd. and Mr Massey to Secretary of State of the United States, 24th April, 1929 para. 7 pp. 47 & 48 of United States Arbitration Series No. 2(4). For the British attitude see Foreign Office letter in Appendix 24.

(8) Stowell. p. 51.

(9) Mr Macey to Mr Clay. 1885. Moore Digest. 11. s.204.

(10) Bradley J. quoted by Jeasup. p. 184.

(11) 41 & 42 Vict. c. 73. See *supra* pp. 175 & 197.

rays are covered by the common law and are not referred to in the Act. Before the jurisdiction under the Act can be invoked, apart from the preliminary investigation, the imprimatur of a Secretary of State is required. In France the relative enactment is dated 2nd July, 1916, modifying Art. 85 of the decree of 24th March, 1852, as amended by the law of 15th April, 1898.

"Toute personne, même étrangère, embarquée sur un navire français ou étranger, qui, dans les eaux maritimes et jusqu'à la limite des eaux territoriales françaises, ne se conforme pas aux règlements ou aux ordres émanant des autorités maritimes et relatifs, soit à la police des eaux et rades, soit à la police de la navigation maritime, est punie..." (12)

VI. The essence of these municipal enactments and the common law where there is no express enactment is that the exercise of the jurisdiction is under the control of the State. Finally, this jus merae facultatis inherent in the littoral State is the basis of the State's right in the marginal sea and other territorial waters conceded by those publicists who do not admit the exclusive right of sovereignty of the coastal State.

VII. In essence, the rights exercised by the State over the maritime domain are the same as those over the territory of the land; the apparent peculiarities are due to the jurisdiction being exercised over ships and those aboard them and to the littoral State being relatively uninterested in anything in the foreign ship which has no effect beyond the vessel. A recent American/

(12) Fauchille 1.2.1093. See Charteris - B.Y.I.T. (1920-21) for an examination of the legal position of merchantmen in foreign ports and harbours where the British and French systems are stated.

(13) Hyde. 1. s. 226.



American writer has put it thus:

"The jurisdiction exercised by the State is proportionate to the interest in the conduct of the ship or its occupants(13)

VIII. Upon the high seas the ship, in default of a local jurisdiction, (14)

is under the control and protection of the flag State which, in turn, expects and requires due allegiance. It may be that none of the crew or passengers aboard are of the same (15)

nationality as the flag. Nevertheless, the ascription of a nationality to and the personification of a ship is a convenience and indeed a necessity. The privileges and respect due to the

vessel on the high seas and in foreign parts are referable to the flag it carries. The vessel itself is a mere chattel and

those aboard a small organised community of private persons collaborating temporarily for purely private ends. They voluntarily

submit themselves to the jurisdiction of the flag State for

the duration of the voyage but otherwise retain their nationality

and personal allegiance to their sovereign. The fiction that

the ship forms a floating portion of the State territory is (16)

false and probably would not now be seriously advanced. Hall, (17)

after a very careful examination of the theory concludes:

"The/

(14) Hall 306. (15) Nys 11. 141. for the historical development.

(16) Nys. 11. 158; Hall 302 says that this theory cannot be traced back further than that depository of bad law- the Silesian loans; Pitt Cobbett 1. 284; Fauchille 1.2.1017 Cunard Steamship Co. v Mellon 1923, 262 U.S. 100.

Lorimer 1. pp. 252 & 253 wholeheartedly supports the conception of extra territoriality of vessels in foreign ports.

(17) Hall 305. In his note states that the impressment of British seamen serving on American ships drove the Americans into asserting the territoriality of ships. This view would not appear to be consistent with the American opinions cit. infra.- but see Moore Digest. 1.s.174.



"The fiction is meaningless unless it conveys that the merchant ship is clothed with the characteristic attributes of territory, and among these are inviolability at all times and under all circumstances short of a pressing necessity of self-preservation on the part of another power than that to which the territory belongs, and exclusiveness of jurisdiction except in so far as it is abated by custom of exterritoriality, which of course cannot be brought into use/against a ship. This however the fiction does not convey. Under the confessed practice of nations the alleged territorial character disappears whenever foreign States have strong motives for ignoring it. It cannot be seriously argued that a new and arbitrary principle has been admitted into law so long as a large part of universally accepted practice is incompatible with it, and while at the same time its legal character is denied by important States and jurists of weight."

The writer is wholly in agreement with the above conclusion. The fiction of territoriality of vessels is untenable. Carried to extreme, the theory would avoid the right of a belligerent to visit and search all vessels upon the high seas and the bottom would fall out of the law of contr<sup>a</sup>band.

"All ships which sail upon the territorial sea are like the waters which carry them within the jurisdiction of the territorial sovereign." (18)

IX. The act of voluntary entrance into the territorial waters of another State implies the subjection of the ship to the territorial jurisdiction of the State. During the ship's stay the protection of the State may be demanded or reparation required where there is neglect. Correlatively, the ship is bound to yield obedience to the local sovereign in so far as (19) this may be required. This is no novel proposition. Reference need only be made to the early treaties of commerce and navigation/

(18) Hautefeuille p. 417; Nys. 2. 158

(19) Cunard Steamship Co. v Mellon 1923 262 U.S. 100 and The Zamora (1916) 2 A.C. 77; For treaty provision see, for example, De Martens Nouv. Rec. 3<sup>e</sup> ser. Vol. 31. pp. 302 et seq. and appendices 12 & 13.

navigation entered into by Britain and other States.<sup>(20)</sup> Down  
the  
through the ages until/recent case of the Cunard Steamship  
Co. v. Mellon in 1923, the attitude of the United States  
has been repugnant to the theory of the territoriality of  
vessels.

"It is part of the law of civilised nations that when a merchant vessel of one country enters the ports of another for the purposes of trade, it subjects itself to the law of the place to which it goes, unless by treaty or otherwise the two nations have come to some different understanding or agreement; for, as was said by C.J. Marshall in the Exchange<sup>(21)</sup>, it would be obviously inconvenient and dangerous to society and would subject the law to continued infraction, and the government to degradation, if such merchant did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country... As the owner has voluntarily taken his vessel for his own private purpose to a place within the dominion of a government other than his own, and from which he seeks protection during his stay, he owes that government such allegiance for the time being as is due for the protection to which he becomes entitled."<sup>(22)</sup>

X. While Britain claims a concurrent jurisdiction with the littoral State over British vessels it concedes full weight to the local territorial jurisdiction. In the case of Reg. v  
<sup>(23)</sup>  
Lesley, the Court said as to the jurisdiction of a foreign power in respect to a British ship:

"We assume that in Chile the act of the Government towards its subjects was lawful; and although an English ship in some respects carries with her the laws of her country in the territorial waters of a foreign State, yet in other respects, she is subject to the laws of that State as to acts done to the subjects thereof. We assume that the government/

(20) See Appendices 21, 22 and 23. (21) 7 Cranch 144.

(22) Mr Bayard, Secretary of State to President, 1887.

Moore Digest, 11. s.175; Phillimore 1. 483; Wheaton  
1. 236-239 - all adopt this view.

(23) (1860) Bell C.C. 220.

government could justify all that it did within its own territory and we think that it follows that the defendant can justify all that he did there as the agent for the government, and under its authority.... But an English ship upon the high seas, out of any foreign territory, is subject to the laws of England; and persons, whether foreign or English, on board such ship, are as much amenable to English law as they would be on English soil."

XI. While it rests with the coastal State, in its discretion, to exercise the jurisdiction, it may be said that a State does regulate pilotage and anchorage in territorial waters, that is traffic and navigation control, which also facilitate the enforcement of the customs and public health regulations. Beyond such 'police' measures designed for the regulation of traffic, the safety of the vessels and their passengers, the legislation of the littoral State, in so far as it touches aliens, would not normally go. It would be impossible to require every tramp steamer to comply with all the diverse domestic laws of each State at whose ports it may touch. <sup>(24)</sup> Lex non cogit ad impossibilia; and States prefer to encourage not to impede international commerce. It is otherwise with the coasting trade or cabotage. It is a national concern and the State may admit or exclude, in the absence of treaty provision to the contrary, foreign vessels from the coasting trade as distinct from overseas carrying trade. <sup>(25)</sup>

XII. It may be taken as doubtful as to when a State may interfere with the interior economy of a foreign vessel in territorial/

(24) U.S. Arbitration Ser. No. 2(4) pp. 101-2.

(25) Oppenheim's definition (l.p. 386) is accepted. See also League of Nations cit. sup. for a further discussion of the term 'cabotage'. The subject is fully discussed by Oppenheim loc. cit. and is here referred to brevitatis causa.



territorial waters or attempt to enforce municipal law as to the complement of the crew and loading provisions. The United States formally protested against the application of the provisions as to the Plimsol (load line) to their ships in the territorial waters of the United Kingdom but the British reply took as the justification the elementary interests of humanity and the matter was dropped. The decision in the case of the Cunard Steamship Co. v Mellon and the subsequent treaties, essentially partaking of the semblance of a compromise, imply that the other States concerned admitted with reluctance the right of the territorial state to enforce its municipal laws even to regulating the domestic economy of the foreign vessels within its ports and territorial waters. A more doubtful exercise of jurisdiction is the application of municipal law to effect an amendment of contract entered into elsewhere between members of the crew, e.g., as to seamen's wages. Whether the jurisdiction should be exercised is largely a matter of policy but it would appear to be settled that the territorial sovereign may subject all vessels entering the territorial waters to the local requirements. As, however, the local sovereign is but little concerned with ships which, although entering territorial waters, do not actually enter the ports, the jurisdiction is not/

---

(26) Moore Digest 11. 204. (28) *cit. sup.*

(28) See ante pp. 167 & 168

(29) Wheaton, l. 271

(30) Moore Digest 11. s. 204; re Shipping contracts (Harte Act) Hyde l. s. 226; Patents see Stowell 147; For conventional provisions as to powers of consuls and extent of local jurisdiction in respect of ships and crews in alien ports see De Martens Nouv. Rec. 3 ser. vol. 31 pp. 208, 210, 302 and 306.



not likely to be invoked and, in many cases, might be held to interfere with the right of innocent navigation.

XIII. To this general rule that all vessels are subject to the jurisdiction of the territorial State, one exception must be admitted. Ships which have involuntarily entered the ports or territorial waters of another State, e.g., by stress of weather or force majeure, must be treated as in need of assistance and according to the dictates of humanity. This rule of international law is not questioned. The enforcement of municipal laws should not extend to a vessel storm battered seeking the calm waters under the lee of the land. If, however, the vessel has been hovering off the coast with a view to the infringement of the municipal laws it cannot claim exceptional treatment should it be forced by unforeseen circumstances to seek the shelter of the waters of the State which it had designed to wrong.

XIV. The right of the riparian State to exercise a criminal jurisdiction is disputed by those who deny the exclusive sovereignty of the State upon the territorial waters. The justification for their view is the infrequent exercise of the jurisdiction. As pointed out above the option of exercising the jurisdiction rests with the territorial sovereign. Much may happen aboard a ship passing through or anchored in the marginal sea unknown to those on shore and it would be a decided inconvenience, if not an impossibility, for/

---

(31) See ante p. 230. (32) Oppenheim 1, 395; Hall 527; Appendices 12 and 13 for treaty provisions.

(33) Stowell. 135

for the territorial sovereign to subject such vessels to strict supervision. The jurisdiction is nevertheless well founded.

"If the United States claim jurisdiction over all offences committed on board of foreign private vessels in their harbours or waters, they cannot, with consistency, assert to have their citizens exempt from their jurisdiction of the local authorities when they commit similar offences in foreign ports.

The question of jurisdiction had been under the consideration of the Supreme Court of the United States. The views expressed by that Court are those which this Government approves, and is disposed to abide by its intercourse with foreign nations...

We should undoubtedly deny the right of any power to demand exemption from trial and punishment by our Courts, of one of its subjects, who had committed a crime on board a foreign vessel in one of our harbours, though that offence should be one which only affected the officers, crew or company of that vessel. Circumstances might render it proper to forego the exercise of the right to try such an offender, but still the right would exist." (34)

In the American view, then, if the municipal law has been  
(35)  
breached, it is immaterial what the offence may be termed.

XV. Instances of offences where the territorial sovereign may clearly exercise a jurisdiction are those (a) which may endanger the public safety or the public peace, (b) offences initiated outside the ship and terminated aboard, and (c) where the commander of the vessel invokes the aid of the territorial sovereign. An offender may be pursued and taken off the ship for an offence committed outside the ship but within the territory of the State: the territorial state must allow the judicial machinery/

---

(34) Moore Digest. 11. s.204; Convention has softened this statement- see consular conventions to which U.S.A. is a party in Martens Nouv. Rec. 3 ser. Tom. 31.

(35) Moore Digest. 11. s. 175.

machinery to function when requested by a foreigner, including the owners of a ship, who allege wrong by another alien within the State's jurisdiction. (36)

XVI. In many States this criminal jurisdiction is regulated by treaty (37) and in others by municipal law; in all it entails, as a rule, the exercise of the discretion of the State. In British territorial waters, the matter is regulated both by treaty, e.g., the North Sea Convention of 1882, and municipal law, e.g., the Merchant Shipping Act, 1894. The British Territorial Waters Jurisdiction Act, the principal British enactment as regards a criminal jurisdiction on the marginal seas does not apply to bays. The omission was deliberate as the latter were understood to be covered by the existing common law. This was the view taken in the case of R. v Cunningham (38) and was referred to with approval in Mortensen v Peters. (39) This Act, the Territorial Waters Jurisdiction Act, has called forth protests from many writers as contrary to Art. 6 of the resolutions of the Institute of International Law passed at the session of 1894: on the other hand, it has been commended by others, e.g., Oppenheim, as a powerful factor in initiating a uniform basis in the practice of States where there was none. The essential points in the Act, for the present, are (a) the jurisdiction is expressly claimed and/ (40)

(36) C.f. Hyde. l.s.226; Hall 306. See also (34) ante.

(37) Fauchille l.2.1094. and (36) ante.

(38) Bell's C.C. R. 72. (39) (1906) 8 F.(J) 93.

(40) Institute of International Law p. 113 et seq. This resolution would not give jurisdiction to the coastal State except where the crime has effect beyond the ship.

(41) Oppenheim l. 389.

claimed and (b) it rests with the administration to say, after preliminary investigation, whether the jurisdiction is to be exercised.

XVII. In theory then, the jurisdiction is absolute, and the exercise thereof is within the discretion of the sovereign. When the jurisdiction should be exercised and the extent to which it should be exercised are governed by practical considerations, namely, the degree to which the interests of the State are affected and whether, in all the circumstances, it is reasonable and expedient to require a submission to the jurisdiction. The right is not lost by non-user or by only occasional exercise if the suspension of the jurisdiction can be explained by circumstances.  
(42)

XVIII. An ancillary right is granted to the territorial State where a foreign vessel, having committed an offence in the territorial waters, seeks to escape therefrom to avoid the consequences of the act. The vessel may be pursued immediately upon the high seas. This right of the territorial sovereign, acting through those whom he has commissioned for this purpose, must be distinguished from preventive action taken upon the high sea to forestall an act or intended act which would injure the State or its inhabitants. In the former case, the offending party is within, or held to be within the jurisdiction, in the latter/

---

(42) North Atlantic Fisheries Award. Parl. Papers. (1910)  
Cmd. 5396.



latter, the vessel is outwith the territorial jurisdiction.

XIX. The salient points of this right of pursuit from the territorial waters, called 'hot pursuit', have been concisely  
(43)  
stated by Hall.

"When a vessel, or someone on board of her, while within foreign territory commits an infraction of its laws, she may be pursued into the open seas, and there arrested. It must be added that this can only be done when the pursuit is commenced while the vessel is still within territorial waters or has only just escaped from them. The reason for this permission seems to be that pursuit under these circumstances is a continuation of an act of jurisdiction which has been begun or which but for the accident of immediate escape would have been begun, within the territory itself, and that it is necessary to permit it in order to enable the territorial jurisdiction to be effectively exercised. The restriction of the permission within the bounds stated may readily be explained by the abuses which would spring from a right to waylay and bring in ships at a subsequent time, when the identity of the vessel or the persons on board might be doubtful."

Should the pursued vessel reach the sanctuary of territorial  
(44)  
waters of another State the pursuit must be abandoned out of respect to the sovereign jurisdiction. The remedy is then to be sought by extradition or diplomatic action. As was said in the  
(45)  
case of the Itata :

"It would be monstrous to suppose that (United States) revenue officers were authorised to enter into foreign ports and territories for the purpose of seizing vessels which had offended against (the United States) laws. It cannot be presumed that Congress would voluntarily justify such a clear violation of the laws of nations."

The arrest to be valid must have been effected in the course of the pursuit. It cannot be abandoned and then renewed: it  
must/

X  
(43) See Jessup 107; Oppenheim l. 482. (44) Oppenheim l. 482.  
(45) Jessup 111 quoting Story J.

(46)

must be continuous. The right was recognised by the Institute of International Law at their session of 1894 but with the proviso (47) that the arrest should be immediately notified to the flag State. Westlake endorses the claim to effect an arrest in the circumstances as being necessary in the interest of justice and the enjoyment of the right of fishery. It is in connection with the latter that cases of Scottish interest are most likely to arise in normal times.

(48) (49)

XX. A doubt has been expressed by Pitt Cobbett and Hyde as to whether this power to arrest, in international law, a right or merely a jurisdiction permitted by the comity of nations. The ground for this dubiety is to be found in the oral opinion of Sir Charles Russell in the proceedings before the Behring Sea Fur Seal Arbitration Tribunal. (50)

"I will state, although not exhaustively, some of the leading conditions. For instance, one condition is that it must be a hot pursuit, - that is to say, a nation cannot lie by for days or weeks and then say: 'You, weeks ago, committed an offence within our waters, we will follow you for miles, or hundreds of miles, and pursue you.' As to that it must be a hot pursuit, it must be immediate, and it must be within limits of moderation. In other words we are still considering the character of the act which is not defined by international law, which is not a strict right by international law, but which is something which nations will stand by and see done, and not interpose if they think that the particular person has been endeavouring to commit a fraud against the laws of a friendly Power."

(51)

XXI. Westlake is of the opinion that Sir Charles would have advanced/

(46) Pitt Cobbett l. 175. (47) Instit. of Inter. Law. p.113.Art.8

(48) l. 175-6. (49) l. s.236. (50) Jessup.106.

(51) l. 178. The British Government in the recent diplomatic correspondence arising out of the sinking of the 'I'm Alone' took the words of Sir Charles as being a true statement of the British view. U.S. Arbitration Ser. No.2 at p.46.

advanced a right, not a permission, if he had had to give a more considered opinion. In any case, the Courts and the governments of both the United States and Britain have held and acted upon the assumption that there is a right. It has, at least, the sanction of general if not universal usage (52) and, until disavowed, may be regarded as a rule of international law conferring a right. Nor do the decisions in the arbitration regarding the James Hamilton Lewis and the C.H. White breach the rule as has been alleged. (53) In those instances the pursuit had not been commended within territorial waters but outside by vessels which had been cruising on the high seas. The arrests were made on mere suspicion that an offence had been committed within territorial waters. The arbitrator was not called upon to endorse the validity of the rule as to hot pursuit. That issue did not arise.

XXII. The rule has been extended to include cases where the vessel may be held to be constructively present in territorial waters when the offence was committed, e.g., where the crime was perpetrated from the ship's boats although the vessel itself may have been outside the territorial limits. (54) Lord Salisbury in the Araunah is very definite:

"Even if the Araunah at the time of the seizure was herself outside the three-mile territorial limit, the fact that she was, by means of her boats, carrying on fishing within Russian waters/

(52) Pitt Cobbett l. 179.

(5A) Moore Digest l. s. 173 is relied upon for the facts and the decision. Jessup (p.108) misunderstands the case. See also Westlake (l.178) for the correct perspective. No protest was lodged by the United States against the pursuit and damage inflicted by the Canadian patrol in the case of the Silvan which was discovered fishing in Canadian territorial waters. U.S. Arbitration Ser. No. 2(4) pp. 141 et seq.



waters without the prescribed licence warranted her seizure and confiscation according to the provisions of the municipal law regulating the use of those waters."

XXIII. This right of hot pursuit and its extension to cover constructive presence became prominent in the cases of arrest of foreign vessels said to have been attempting to breach the (55) American prohibition laws. In the first important case, the Grace and Ruby which was seized outside the three mile limit, the ship's dory and part of the crew had been arrested within territorial waters in the act of attempting to breach the municipal law. The Government, in reply to the British protest, founded upon the precedent of the Araunah and the matter was (56) dropped.

XXIV. The Court's decision in the Grace and Ruby, however, was (57) founded upon the doubtful case of Church v Hubart and might well have been passed over had the decision in the later case not (58) been regarded as a binding precedent. The Court held that the validity of the original seizure was immaterial when the ship was, at the date of the trial, in the possession of an official of the Court and that no plea in bar of the jurisdiction could be considered in such circumstances. This was surely a perversion, if not a denial, of justice: this argument would justify piracy under cloak of official sanction! Even the/

(54) The Araunah. Moore Digest 11. s.316. See also other cases cited by Jessup p. 112.

(55) For the facts reliance has been placed upon Jessup.

(56) Hansard 5th Ser. Vol. 163. Col. 968.

(57) 2 Cranch 187. (58) Jessup 275.



the subsequent ratification of the seizure by the government could not validate that which was invalid in international law in a question with foreigners seized outwith the territorial jurisdiction.

(59)

The case of the Henry L. Marshall is also typical of others. British registration of the craft had been obtained under pretence amounting to fraud. In this and other cases, the British Government refused to recognise the British registration of the vessels, holding that, in their view, the vessels were still American ships and therefore under the sole jurisdiction of the United States.

(60)

One/

---

(59) U.S. Arbitration Ser. No.2(4) at p. 127 et seq.

(60) Jessup (p. 247) in his anxiety to support his thesis of the rectitude of the United States' exercise of a jurisdiction under the prohibition laws in seizing vessels anywhere, even upon the high seas, oversteps the mark in his criticism of the case of the Henry L. Marshall. With the British denial of British registration of the vessel, the case, so far as Britain was concerned, was closed. They rightly refused to be drawn into controversy or to express views upon hypothetical cases. Jessup contends that the British Government were bound to uphold the fraudulent registration and cites the case of Mortensen v Peters (1906) 8 F.(J) 93. But the registration of vessels is regulated by municipal law. The Norwegian Government, in the case of Mortensen, considered the Norwegian registration valid; and the Norwegian Government must be presumed to be the best judge of its laws. Similarly with the British Government, it should not be expected to homologate and encourage frauds upon its laws in order that citizens of other States might wrong their country.

This view is not inconsistent with the findings in the case of the I'm Alone that the tribunal might enquire into the beneficial or ultimate ownership of the vessel although registered under the British flag. The British contention was that the matter of registration and the penalty for fraudulent registration were matters for the municipal law of each State and to make the suggested enquiry was to subject the Sovereign to the jurisdiction of the tribunal without the Sovereign's consent, that is, contrary to law. It was clear from the Commissioners' answer that they desired to ascertain these facts in order to consider the measure of damages to be awarded in respect of certain aspects of the claim for the illegal sinking of the vessel. In this the Commissioners acted upon grounds of expediency/

One cannot cavil at the judgments of the American Courts, who perforce, had to administer the law of the State as they found it, in respect of vessels seized beyond the accepted limits of territorial waters. In the Grace and Ruby, the opinion was expressed that it was for the political department to say as to the limits of shore waters within which foreign vessels infringing the laws of the State should be seized: the Courts could not refuse to adjudicate upon cases brought before them or to apply the law as they found it whether in conformity with international law or not. The executive rectified the matter by Treasury Order dated November, 9, 1922, (61)

November 9, 1922.

The Collector of Customs,  
New York.

Sir,

This Department is in receipt of your telegram of 8th inst relative to the seizure of the British auxiliary Schooner, M.M. Gardner, on September 13, 1922.

It appears from your report that the seizure was made outside the three-mile limit, and that while the master admitted unloading part of the cargo beyond the three mile limit there is no evidence that the vessel was communicating with the shore by means of her own boats or equipment.

Under these circumstances it is the desire of the Department of State and the Department of Justice that all foreign vessels so seized shall be released, and you be governed accordingly. A report to the Department should be made in each instance.

Respectfully,

A.W.Mellon. Secretary.

It/

- (60) Contd. expediency and not of law. They did not found upon the registry of the vessel being irregular but, as the ultimate owners were American citizens engaged upon attempts to wrong their State, they did not award any damages for the loss of the vessel or cargo as that would have entailed a payment by the United States, not by the owners who were attempting a crime against their country, and the enrichment of and not an indemnity to Britain for the loss of the vessel. On the other hand, the registry of the vessel was respected for the sinking of the vessel was found illegal and suitable acknowledgment of the wrong required.

United States Arbitration Series No. 2 (7)

- (61) Quoted by Jessup p. 254.

It is suggested that the United States' Treasury's interpretation of the rule of international law as to constructive presence was eminently reasonable. It may be presumed that where the ship's own boats or crew are used in the commission of the offence within territorial waters there is the unity of control which makes for 'constructive presence'. In all other cases, e.g., where other boats are employed and the chief parties are stationed on the vessel itself and may be proved to have had full control of the operations, it is a matter of evidence and proof as to whether there is in fact sufficient grounds for holding the vessels to have been constructively present in the territorial waters.

XXV. Question may be put as to whether the rule of hot pursuit with all its attendant conditions still holds in the light of changed circumstances brought about by the increased speed of vessels and improved means of communication such as radio-telegraphy. The recent cases and the decision of the tribunal (62) as to the Canadian I'm Alone, which was sunk after several days of pursuit well away from the locus of the alleged offence, would appear to show that the rule must still be restricted in its application and applied with moderation. States are naturally reluctant to allow their vessels to be interfered with on the high seas and the only other solution is the possible extension by treaty of the limits of territorial jurisdiction to meet special difficulties which may frequently recur. This was the/

---

(62) U.S. Arbitration Series No.2 (1)-(7).



the solution adopted by the United States and Finland.<sup>(63)</sup>

XXVI. The principal restriction upon the territorial sovereignty of the littoral State is the right of innocent passage through the territorial waters by foreign merchantmen. While there is some modern conventional authority on the subject the right is universally admitted in the sense that innocent passage is never refused. Territorial waters, in this respect, have fallen into the general term of the high seas. In the words of Hall, who regards the right as a servitude, and whose opinion as to it being an indubitable right is endorsed by other leading jurists, including the Institute of International Law, the position may be stated thus:

"In all cases in which territorial waters are so placed that passage over them is either necessary or convenient for the navigation of open seas, as in that of marginal waters, or of an unappropriated strait connecting unappropriated waters, they are subject to a right of innocent use by all mankind for the purposes of commercial navigation... For more than two hundred and fifty years no European territorial marine waters which could be used as a thoroughfare, or into which vessels could accidentally stray or be driven, have been closed to commercial navigation; and since the beginning of the nineteenth century no such waters have been closed in any part of the civilised world. The right must therefore be considered in the most complete manner."

XXVII. It has been doubted whether this right is of very great importance or whether its denial would cause serious injustice.

(63) See Appendix 26; Finland (1932-33) Cmd. 4436 and the Treaty of Helsingfors, 19th August, 1929 between the Baltic States, De Martens Nouv. Rec. 3<sup>e</sup> Ser. Vol. 111 pp 208-210

(64) For consular treaties stipulating freedom of navigation entered into by U.S.A. De Martens Nouv. Rec. 3<sup>e</sup> Ser. Tom. 31 pp. 208 & 210. 302 & 306.

(65) p. 197. (66) p. 203.

(67) Pitt Cobbett l. 153; Phillimore l. 278; Westlake l. 193-4; Hyde l. s.154; Moore Digest l. s.144 p.700; League of Nations C.230 M. 117. 1930. V. p.8.

(68) Institute of International Law, p. 113.



as the deviation from the course of a vessel to avoid territorial waters would be very slight. On the other hand, there is no point in the territorial sovereign objecting. Any action on his part to that end might have all/round irritating inconveniences arising from reciprocity of treatment by other States.

XXVIII. "Innocent passage" does not include passage through the territorial waters to enter or to depart from a port; it covers only those ships which, in the course of their voyage, find it convenient to traverse the territorial waters of another nation without touching any part of the coast. Should the vessel anchor, except as an act incidental to the ordinary course of navigation, it ceases to be engaged in 'innocent passage' and its rights and duties are regulated in the same manner as any other vessel in territorial waters.

XXIX. While the tendency today is to grant equality of treatment in maritime trade to all nations on the basis of reciprocity including harbour, light and pilotage dues, no State could now levy dues for the passage of vessels through territorial waters. In the marginal sea collection would be difficult and, since the abolition of the Sound dues in 1857, the last instance of the exercise of the right to collect such from vessels passing through territorial/

(69) Mr Miller (U.S.A.) League of Nations p. 58 C.351(b)M. 145(b) 1930 V; Stowell 148.

(70) See, for instance, Convention on the International Régime of Maritime Ports (1925) Cmd. 2419.

territorial straits, any attempt to resuscitate the practice of former times would meet with the united opposition of all  
(71)  
interested maritime powers.

XXX. Passing vessels are not, however, exempt from the local regulations affecting navigation or purposed to protect the interests of the inhabitants of the coastal State. These local laws may be said to cover regulations for (a) the safety of the traffic and the traffic channels; (b) the protection of any exclusive fishing or other rights which the coastal State possesses.  
(72) Further, while the territorial State may seldom exercise the right, passing vessels are liable to visit and search if such be considered necessary to establish the innocence of the passage. Such a right, if exercised without reasonable  
(73) cause, would lead to justifiable protest by the flag State. Finally, should any person or vessel do any act prejudicial to the littoral State or infringe any of the regulations above-mentioned the passage ceases to be innocent and the jurisdiction of the state may be exercised to the fullest extent.

XXXI./

(*Jos Espada*)

- (71) Craig 1.16.17 admitted the legitimacy of the Danish Sound dues as payments for services rendered but objected to them as a source of profit to the State. See also Phillimore l. 255; Oppenheim l. 387; Pitt Cobbett l. 153; Moore Digest l.s. 134; Institute of International Law p.113 "The interests of the whole world are concerned in the possession of the utmost liberty of navigation for purposes of trade by the vessels of all States." Hall 198. It may be noted in passing that despite strenuous efforts towards national economic independence, to date so far as the writer is aware, there has been no attempt to resuscitate restrictions upon navigation in territorial waters.
- (72) League of Nations C.351(b) M.145(b) 1930 V. The above is the British view as expressed at the Codification Conference; Halleck l. 168-9; Lawrence p. 184; Fiore paras. 277-8; Vattel l. s.123; The Zamora 4 Lloyds P.C. p.100; Hansard 3rd ser. vol. 237 p.1601 (Lord Chancellor).

XXXI. The right of innocent navigation then amounts to this, no State may exclude any merchantman of another State from passing through the territorial waters in the course of trade so long as the local regulations as to navigation and the preservation of the rights of the State are observed, and no exaction may be demanded except such as may have been incurred by the vessel/ as an ordinary obligation for specific services rendered to the ship. As a restriction upon the exclusive territorial sovereignty, the right of innocent passage is thus of little weight.

XXXII. Jurists differ as to whether men-of-war have the right of innocent passage like the peaceful merchantmen. Innocent passage is, in fact, never denied in time of peace but States do purport to regulate it. Hall is against the concession on the grounds that the world wide interests in the freedom of navigation for the advancement of commerce are absent in the case of warships. Westlake, and he is followed by Pitt Cobbett, points out that warships are frequently engaged upon the most peaceful of missions and they ought to be entitled to the right of passage. Lawrence also stresses the fact that the term 'innocent passage' refers to the character of the passage and not to the quality of the vessel. Fauchille, since he holds that the State does not have the right of exclusive sovereignty over/

(73) Nielsen p. 450 and U.S. Arbitration Series No.2.(1)&(4)

(74) p. 198. (75) ; (76) 1. 149; see also De Louter 1. 260.

(77) s. 88. (78) 1.2.1006.



over the territorial waters, concludes that a warship has a right of passage so long as the security of the littoral State is not endangered. At the same time he recites a lengthy list of municipal regulations which would appear to show that the States do claim to control the entry and stay of foreign warships in territorial waters. (79)

XXXIII. The reason for the special treatment accorded to foreign warships is that the ship has been commissioned by the State and carries the pennant of the State. It is a representative of the sovereign no less than an ambassador but, (80) because it is an armed force, other States are not bound to receive it into their territorial waters or ports. As was said by Mr Root:

"Warships may not pass without consent into this zone (territorial waters), because they threaten. Merchantships may pass and repass because they do not threaten." (81)

When warships enter the waters of a friendly power they are admitted only on licence, express or implied. This is clear for many States determine the number which may be admitted and the conditions to be observed. The terms of the Treaty of Peace between the United Kingdom and Sweden dated 1654 (82) is substantially similar to the municipal law enacted by several European and American States in the twentieth century. (83) The most recent example of international interest is the convention as to the Dardenelles. Apart from the restriction as/

(79) 1.2.1008 et seq.

(80) Moore Digest 11. s.254. Parlement Belge (1880) 5 P.D.197.

(81) Jessup. 120. (82) Appendix 12.

(83) Fauchille cit sup.; Hall p 198 (note); Moore Digest 1.s.134

(83a) 1935-36 Cmd 5249.



as to the number of vessels to be admitted at any one time and a requirement of prior notice of approach, the conditions to be observed by foreign warships aim at avoiding any cause for complaint on the grounds of conduct prejudicial to the security, health of the community, or good conduct in the territory of the receiving State.

XXXIV. The ship of war of a foreign Power is to be received with all the respect due to the direct representative of an equally independent sovereign and treated with the courtesy due to such; <sup>(84)</sup> the vessel cannot be subjected to any form of judicial process. This was the finding of the American Court in the <sup>(85)</sup> leading case of the Exchange, which has been accepted as authoritative in international law. Courtesy and respect impose a correlative duty upon visiting vessels to observe the local regulations and, if they fail to do so, may be required to depart from territorial waters. The vessel is not under the jurisdiction of the local State; in so far as any subject may have ground for complaint against the foreign warship, his plea for redress should be addressed to the sovereign of the flag State who should bear in mind that to dispense justice with an equal hand, even against himself, is one of the attributes of sovereignty.

XXXV. The fiction that the warship constitutes a part of the territory of its State is needless. The relationship constituted when a warship enters a foreign port is that of guest and host, regulated/

(84) Vattel iv.c.7. s.92 re ambassadors.

(85) (1812) 7 Cranch 116. 135. See also passim S.S. Cristina [1938] A.C. 485.

regulated by courtesy. The ship may not be subjected to  
 (86) search but the purpose is served by obtaining an assurance on  
 the point at issue from the officer in command of the vessel.  
 Etiquette requires that his word be accepted.

XXXVI. The exemption from local jurisdiction is not to be  
 taken to afford aboard a public ship an asylum for any fugi-  
 tives from justice but a distinction is drawn between criminals  
 (87) and political refugees. The latter may be received at the  
 discretion of the ship if they present themselves. The surren-  
 der of the former may be requested but not enforced, the  
 latter may not be invited aboard and any attempt to do so  
 would be just cause for requiring the departure of the ship  
 (88) as having abused the hospitality extended to it.

XXXVII. Assimilated in many respects to warships are the  
 vessels of a State which, while commissioned by the Sovereign,  
 engage in trade in competition with the ordinary merchantmen.  
 This problem, while not novel, is becoming more difficult  
 since States are now more and more engaging in trade and a  
 definite rule of law is the more desirable to bring such  
 commercial vessels into line with those of the private individ-  
 ual. The case which has directed British jurisprudence is  
 (89) that of the Parlement Belge, a commissioned vessel of Belgium  
 engaged in carrying mails and passengers. The Court held that  
 as/

(86) Moore Digest 11. s. 254. An instance of constraint was  
 characterised as an "unparalleled insult."

(87) Hyde. l.s.254. and (86) above.

(88) Pitt Cobbett l. 273-4 where this is fully discussed.

(89) 1880) 5 P.D. 197 at p. 219 for ratio decideni.

as the vessel had been declared to be in the possession of a sovereign as a ship of war to enquire further would be to submit that sovereign to the jurisdiction which was inconsistent with international law.

The subject was recently under discussion in the case of the S.S. Cristina and, although every aspect of the problem did not fall to be treated, this case will doubtless rule the cases which may come before the British Courts in future. In this case it was noted that there was no uniformity amongst jurists as to whether a public ship engaged in commerce should be exempt from judicial process but the Court proceeded upon the rule that an independent sovereign could not be impleaded in the Courts without his consent. The vessel in this case had come into the quiet possession of a de jure sovereign power and the action was to oust them as possessors of the ship which was in a British port: the Spanish Government had not consented to the jurisdiction of the Court. As obiter dicta the opinion was expressed that had the chattel been in the possession of a private person they could not have obtained possession, the article being within the territorial jurisdiction without judicial process. The question of the validity of a decree of a foreign sovereign within British territorial jurisdiction was not seriously raised in this case but was dealt with in the case of Chung Chi Chuang v Rex it was held that the local jurisdiction was in full vigor subject to certain immunities and proceedings in the case of a public ship. From a survey of the cases it would seem that in Britain the concession to public will be accorded to any government recognised de jure although

(90) [1938] A.C. 485. The former decisions were considered fully and are referred to here previtatis causa.

(90a) [1938] 55 T. L. R.



although that government may not be the de facto government. But a caveat must be entered: the Court in the case of the Cristina appeared to have some hesitation in saying that they<sup>were</sup>/ favourable to an application of the principle to every ship employed by a State in ordinary competitive commerce. It is the writer's opinion that it would be difficult to avoid granting the concession and the remedy must lie with the legislature and the Foreign Office.

XXXVIII. The American Courts appear to follow the British rule: (91) other States, e.g., Italy, recognising the inequity of unqualified exemption from the jurisdiction of state-trading ships, have denied the concession. Germany was precluded by the Treaty of Versailles from claiming the right. The International Maritime Conference of 1922 and 1926 recommended that governments should accept full responsibility in respect of ships and cargo as if their ships were private, excepting always (a) war-ships and (b) other ships employed solely on government work proper. The recommendation was supported by the British Imperial Conference of 1926 (92) but has not yet been ratified by Britain. In these circumstances, the practice of States varying and looking at the inequity of exemption on a large scale, it may be assumed that, in international law, the matter is (93) not yet settled.

XXXIX./

---

(91) Wheaton 1.241-2. (92) (1926) Cmd. 2788 pp.56 &57.

(93) For a review of the attitude of various States see Matsunami. R.I.D.P. 1932. pp. 34-70 and 1936. pp. 801-833.



XXXIX. Finally, there is the class of public ship engaged on scientific and philanthropic missions. These are universally granted exemption from local jurisdiction out of respect not only to the sovereign employing them but also to their humanitarian mission.

## CHAPTER VI.

### State jurisdiction in time of War.

(A discussion of the rights and duties of neutrals is, at the present moment, fraught with more than ordinary difficulty. It is not within the scope of this essay to discuss the inept conceptions of non-recognition and non-intervention, both being terms implying shallow pretences to cloak the shifts of political expediency and insincerity. Under the League Covenant no member state could fulfil in their entirety its obligations and remain neutral. Further, the leading States can no longer disclaim responsibility for the acts of their citizens for States have descended from an aloof sovereignty into the mundane realms of commerce and control the acts of nationals where the State has not itself assumed a monopoly in manufacture and trade. Consequently what may have been permitted to a citizens of a neutral State may now be substantially the act or constructively the act of the State itself and as such no longer permissible. The mirror of the past may therefore be an unsafe guide to the future.)

I. It need only be remarked that, in time of war, the territorial waters of a belligerent, vis à vis the other belligerents, form part of the theatre of war indistinguishable from the high seas. As regards neutrals, the waters retain their status under the territorial sovereignty of the littoral State. The maintenance of the security of the belligerent State, however, becomes of immediate and paramount importance and all other interests are subordinated thereto. Thus the neutral may find the regulation of shipping in the territorial waters of a belligerent more stringent, and, compared with the freedom allowed in peace, oppressive. Portions of the coastal waters may be closed to navigation and the approach to fortified places prohibited. Nor is the property of the neutral safe in the ports of the belligerent for, in a pressing emergency, it may be requisitioned by the belligerent government under the <sup>(1)</sup> jus angariae. It may be too that his own State will not be prepared to accord the merchant any protection where the local <sup>(1a)</sup> sovereignty is unable to do so.

II. But if the territorial waters of a belligerent are thus given over to war, it is otherwise with the waters of a neutral. In no other branch of the law relating to territorial waters

has/  
(1) Birkenhead p.327 ; Garner International Law l. 173 & 179  
As to the acquiescence of the neutral State see De Louter  
ii. 433: Hall pp. 96 & 97; Moore Digest vii. s.1288;  
Rolin 3 c.iv. s.4.

(1a) Hansard 5th ser. 322.1726.

(2) Lawrence p. 582. See also Westlake ii. 162-3 for the importance of a high ethical standard on the part of neutrals.

has there been so many changes and, at times, uncertainty.

"The laws(of neutrality) contain some of our oldest and some of our youngest chapters of our science.. It sets forth principles that have been consecrated by general assent, and principles which are still warmly supported and fiercely decried. High ethical considerations have moulded some parts of it, while others have arisen from the conflict of opposing self-interests.(2)

In time of war when passions are roused and national resources are strained for the conflict, the belligerent sovereign, jealous of his dignity and cause, is critically watchful of those 'who are on neither side'; the neutral, on the other hand, while neutrality may have been and may yet be commercially profitable, courted and perhaps distrusted by both sides, must guard his step, must observe a high standard of conduct, and be vigilant in enforcing his rights lest by negligence therein he be condemned as unneutral. Such factors have assisted in the rapid development of and change in the laws of neutrality. Finality has not yet been reached.

III. Streaks of light preceded the dawn of the modern law which may be dated from the French Revolutionary Wars. But every war of considerable importance has brought about some further development. In the old sea laws of Scotland we find as early as 1542:

"War/

---

(3) Sea Laws. c. 118.

"War being between the King of France and the Emperor, and peace being between this realm and France, no Frenchman may take any ship, goods or gear, pertaining to any of the Emperor's lieges, within our sovereign Lord's seas or waters, and having our sovereign Lord's safe conduct: And if any such ship happens to be taken, she ought to be restored and delivered again; for she is not just and lawful prize."

(4)

In the proclamations of the Stuarts from 1604 onwards, there is a decided modern ring - the prohibition of hostilities within the sovereign jurisdiction, the regulation of the admission of prizes and warships, even the prohibition of the fitting out of ships for the use of belligerents, - points which have but recently been recognised as components of the laws of neutrality. As late as 1757, however, the Scottish Courts appear to have circumscribed the territorial jurisdiction and lightly regarded the sanctity of territorial waters.

"The province of the (prize) Courts in such a (neutral) State is only to try whether or no the peace of the port has been violated by the capture. If this has been the case they ordain him to restore the possession; if not, they leave it as they found it."(5)

(6)

(7)

IV. Bynkershoek and Vattel formulated rudimentary conceptions of neutrality. The early jurists, recognising the practice of the time, were compelled to admit degrees of neutrality; (a) perfect neutrality, (b) imperfect neutrality which in turn could be subdivided into impartial, allowing the/

---

(4) Holdsworth V. 48-49. vi. 308 -9.

(5) Benton v Brink Morrison's Dictionary. p.11949.

(6) Questiones etc. l.c.9.

(7) III. s.103.



the passage of belligerent troops through the territory, and (c) qualified, that is where prior convention as to subventions were allowed full force. Perhaps one of the best of the early statements, emphasising as it does the rights as well as the duties of the neutral State, is that given by Von Martens: If a State observes a strict neutrality,

"it has the right to insist upon being treated as neutral by the powers at war; and, consequently, those powers ought to desist from all violences towards it, except such as absolute necessity may authorise."

"To observe an entire neutrality, a State must abstain from warlike expeditions. It must grant or refuse nothing to one of the belligerent powers, which may be useful or necessary to such power in prosecuting the war, without granting or refusing it to the adverse party; or at least, it must not establish an inequality in order to favour one of the parties more than the other.

The moment a neutral power deviates from these rules, its neutrality is no longer entire, but limited: and indeed, though neutral States sometimes promise more, and enter into conventional neutrality, a limited neutrality is all that the laws of neutrality impose."(8)

"The laws of nature forbid the belligerent powers to continue hostilities in the territory or in the parts of the seas, under the dominion of a neutral power."(9)

The right of the neutral to be allowed to remain at peace and his duty not to sit as judge between the parties to the  
(10)  
quarrels are brought out by Ortolan.

„Lorsque deux puissances se font la guerre, ceux des autres Etats qui, avant que cette guerre surgit, etaient simplement amis de l'une et de l'autre, ont le droit incontestable de demeurer tels pendant qu'elle dure; mais pour conserver ce caractère, c'est par eux un devoir non seulement de s'abstenir rigoureusement de toute participation à la guerre, mais encore de ne s'immiscer en rien dans la querelle des belligerents, et tout en maintenant avec chacun d'eux les relations ordinaires de l'état de paix, de ne rien faire en faveur de l'un qui puisse tourner au détriment de l'autre."

V./

(8) VI. c.vi. s.1 & s.2. (9) do. s. 6.

(10) 11. p. 77.

V. The condition of neutrality requires also the recognition of the rights of the belligerents and this implies the tacit acquiescence of the neutral in many acts which, in the normal times of peace, would not be tolerated. This factor of acquiescence is emphasized by the more modern writers, such as Hall,<sup>(11)</sup> Holland<sup>(12)</sup> and De Louter<sup>(13)</sup> and it is safe to say that as international intercourse becomes more and more intensified and complicated so will the forbearance required of the neutral <sup>become more difficult</sup>. The two factors of impartiality and acquiescence are the foundation of the laws of neutrality. The details which form the superstructure will be considered below but it may be stated here that the approach to the idea of strict neutrality was rapid from the French Revolutionary Wars until the attempt to codify the law as to maritime warfare was undertaken in the Hague Convention, No. XIII, of 1907. As indicating the advanced stage reached it may be mentioned that, although several of the belligerents in the war of 1914-19, had not ratified any of the Conventions and Britain had not ratified the Convention for the adaptation of principles of the Geneva Convention to maritime warfare, the Conventions were accepted and taken<sup>(14)</sup> as binding wherever applicable. It may therefore be assumed as probable that, except where there was express reservation by a State to particular provisions, Convention XIII now represents rules of international law. Since then, <sup>however,</sup> there has been an apparent retrogression: the conduct of the northern European States to show a preference to Germany in the war of 1914-19 portended a return to the former imperfect neutrality; add to this the ~~present~~ <sup>assistance/</sup>

(11) pp. 96 & 97. (12) Moore Digest. VII. s. 1288.

(13) De Louter 11. 433. (14) Garner Inter. Law. 1. 21.

X assistance openly given by neutrals to the combatants in the recent / Spanish Civil War. The idea of imperfect neutrality was embodied in the Covenant of the League of Nations whereby member States were to be required to allow troops the right of passage through the territory and to adopt other measures of coercion when called upon. (15)

VI. Nevertheless while the instability of the law of neutrality is recognised, the definition propounded by Oppenheim would appear to be the most comprehensive and still valid:

"Neutrality may be defined as the attitude of impartiality adopted by third States towards belligerents, such attitude creating rights and duties between the impartial States and the belligerents." (16)

VII. The primary right of the neutral state is that its territory and sovereignty be respected by the belligerents. There is no better established rule than that belligerents must cease from hostilities within the territorial waters of a neutral. As Sir William Scott put it in the case of the Vrow Catharine (approved in the case of the Dusseldorf): (17) (18)

"The sanctity of a claim to territory is undoubtedly very high... When that fact is established, it overrules every other consideration. The capture is done away; the property must be restored, notwithstanding that it may actually belong to the enemy; and if the captor should appear to have erred wilfully and not merely through ignorance, he would be subject to farther punishment."

It was the declared policy of the United States in 1793 not to "see with indifference its territory or jurisdiction violated" by either of the belligerents.\* (19) This rule now rests upon the/

(15) Art. XVI. (1921) Cmd. 151. Misc. No. 3(1919).

(16) 11. p.519; c.f. Fiore s. 1791 and ss. 1799-1807. The definitions of Woolsey (p. 262), Taylor (p. 651) and Lawrence/



the Hague Convention of 1907 :

"Belligerents are bound to respect the sovereign rights of neutral Powers and to abstain, in neutral territory or waters, from any act which would, if knowingly permitted by any Power, constitute a violation of neutrality.

Any act of hostility, including capture and the exercise of the right of search, committed by belligerent warships in the territory of a neutral Power, constitutes a violation of neutrality and is strictly forbidden."

It is to be noted that the prohibition of not only acts of combat but also of visit and search is absolute.

Bynkershoek is the only jurist of note who would admit that pursuit might be continued dum fervet opus from the high seas (21) into the territorial waters of a neutral Power; but the practice of States is clearly against him. Even action under the "influence of a patriotic and commendable zeal to bring to punishment those who had offended against the laws of both (22) countries" will not excuse the breach. The capture must be legally complete while both captors and captured are outwith (23) territorial waters. No particular formula is necessary to establish the fact of capture. The evidence must show there has been a submission to the will of the capturing vessel and a clear abandonment of any attempt to escape. Thus a capture was held invalid where the vessel had hauled down its flag and had apparently stopped the engines but declined or failed to alter its course and drifted into neutral territorial waters before/

(16) Contd. Lawrence (p.582) are inadequate as they fail to import the obligations of States inter se. Lorimer's definition (vol. 2. pp. 121 & 122) would justify every state sitting in judgment on the belligerents and thereafter taking active part in the quarrel.

(17) 5 Ch. Rob. 15, 16.

(18) [1920] A.C. 1039; See also Scottish case of Hunter v Bothner (1764) Morrison 11957.

(19) Moore Digest. vii. s. 1334. (20) Scott's Reports. p.841.



(24)

before the boarding party could take possession.

The territorial waters of a neutral may not be used as a station for belligerent vessels from which they may habitually proceed to intercept approaching vessels while still outwith the territorial limits. To do so would be making the territory of the neutral a base of operations for proximate acts of war.

VIII. The neutral State may take active measures to prevent the violation of its neutrality in its waters. It may lay contact automatic/mines, provided the other States are notified, but they may not be so laid as to benefit only one party to the detriment of the other ~~was~~ was done by Sweden in closing the Kögrund Channel leading to the Baltic, an operation which favoured Germany to the disadvantage of the Allies in 1914-19. As Oppenheim points out, Art. 4 of the Hague Convention No. VIII of 1907, as with the other provisions as to mines, proved valueless during the war of 1914-19. By Art. 9 of Convention No. XIII a neutral Power may regulate the admission of belligerent warships to the ports and roadsteads and may refuse admission to one who has been negligent in respecting the particular regulations or has violated the neutrality of the State. Such regulations were made, at the instance of the Allies, during the European War by Norway, Sweden, Spain, and Holland in respect of submarines traversing the their territorial waters(26)/

(21) Questiones etc. l.c.8. s.5.; Hautefeuille p. 418. says this appears to be a grave error on the part of Bynkershoek.

(22) Parl. Papers. 1876 North America (No. 10) Case of the Chesapeake.

(23) The Pellworm [1922] 1. A.C. 292.

(24) do. As to liability to arrest of fishing vessels drifting into territorial waters, see The Frederick Gerring Jr. (Nielson) p. 575.

waters.<sup>(26)</sup> Finally, the fact of a neutral power repelling, even with force, attacks on its neutrality cannot be considered a hostile act.<sup>(27)</sup> As this is purely a defensive measure the force employed must be restricted to the amount necessary to preserve the neutrality intact and no more.

IX. In the event of the neutrality being violated, it is open to the neutral to require reparation. Indeed, if there has been negligence or fault on the part of the State in enforcing recognition of and respect for its neutrality, that State might justly be held to have forfeited its right to be treated as a neutral by the belligerent who has been injured by the breach or negligence of the neutral.<sup>(28)</sup> The form which reparation should take must vary with the circumstances and no rule is possible. It is to be noted that as between belligerents a capture in the territorial waters of a neutral is valid according to the British and American view and it is only at the instance of the neutral sovereign that the capture may be declared invalid.<sup>(29)</sup>

"No proposition in international law is clearer or more surely established, than that a capture made within the territorial waters of a neutral is, as between enemy and belligerents, for all purposes rightful, and it is only by the neutral State concerned that the legal validity of the capture may be questioned/

(25) The Anna (1805) 5 Ch. Rob. 373. The Twee Gebroeders (1800) 3 Ch. Rob. 162. The Vrow Catharina (1803) 5 Ch. Rob. 15. But see Garner pp. 232 & 233 where the German and French view would appear to be against the admission of even a chance occasion of a belligerent vessel proceeding from territorial waters to effect a capture.

(25a) Oppenheim 11. p. 619.

(26) Garner Inter. Law 11. 419; Hall pp. 753-4; Pitt Cobbett 11. 479 re U.S.A. (27) Hague Convention No. V. Art. 10.

(28) Birkenhead p. 316. C.f. Letter of Sir Leoline Jenkins. He would not advise the manner or time of demand for reparation for an insult to the sovereign (Quoted Moore International Adjudications Vol. 4. p. 496.)

questioned. It can only be declared void as to the neutral State and not as to the enemy."

The German Prize Courts, taking a different view, hold that they have no power to adjudicate upon the validity of prizes taken within the territorial waters of a neutral State; the result is that all prizes proved to have been taken in neutral waters are illegal. The intervention of the neutral sovereign is unnecessary. The French Prize Council appears to have adopted a similar view. In all probability, though slight differences of opinion were revealed on the Commission which drew up Convention XIII, the neutral State ought to use all the means at its disposal to obtain the release of the prize illegally taken. (30) (30a)

X. It is important to note, therefore, that<sup>it</sup>/is only the sovereignty of the neutral State which requires to be vindicated. As regards the belligerent State which has been injured in the property of its subjects, there may be a question of indemnity as the vessel was sub protectione regis, but any plea for vindictive damages cannot be sustained. It is sufficient for the vindication of the neutral sovereignty that the status quo be restored. Thus, if the prize voluntarily comes within the jurisdiction of the neutral State whose neutrality has been violated, the State is required to release the vessel and intern<sup>the/</sup>

(29) The Anne (1818) 3 Wheat. 435 at p.447; Sir William Peel (1866) 5 Wall. 517 at p. 536; The Adela 1867 6 Wall. 266; The Achaia V. Lloyd 68; The Pangor [1916] P 181 at 185; Hague Convention No. XIII. Art. 3.

(30) Garner p. 228. (30a) Hague Conference Reports pp. 841-2.

(31) The Valeria [1921] A.C. 477. (32) Moore Digest. VII.s.1325.



the prize crew. On the other hand, if the vessel is outwith the jurisdiction, its release together with the crew and equipment should be demanded.<sup>(33)</sup> The question of the amount of damages, if any, awarded was discussed in the American case of La Amistad de Rues:<sup>(34)</sup>

"The doctrine heretofore asserted in this Court is, that whenever a capture is made by any belligerent in violation of our neutrality, if the prize come voluntarily within our jurisdiction, it shall be restored to the original owners. This was done upon the footing of the general law of nations. But this Court have never yet been understood to carry their jurisdiction, in case of violation of neutrality, beyond the authority to decree restitution of the specific property, with the costs and expenses during the pending of the judicial proceedings. ... We consider it no part of the duty of a neutral nation to interpose, upon the mere footing of the law of nations, to settle all the rights and wrongs which may grow out of a capture between belligerents... All that justice seems to require is that the neutral nation should fairly execute its own laws and give no asylum to the property unjustly captured."

The application of the rule, where the violation of the neutral territory was unintentional and the vessel subsequently lost while being taken to a belligerent's port for adjudication,<sup>(35)</sup> is illustrated in the British case of the Valeria.

"In the present case the capture was within territorial waters and the only wrong that can be vindicated is the wrong to the sovereignty of His Majesty the King of Norway..... Restitution of the vessel is restoration of the status quo, but payment of her value in money would either leave in the hands of the Norwegian Government a profit on the whole transaction, which is a contradiction of the whole idea of an indemnity, or would constitute them agents or trustees for the German Owners, who on receipt of the money would be recompensed for that which was no wrong to them, so that again the principle of indemnity would be departed from."

Precisely/

(33) Hague Convention No. XIII. Art. 3. and note (30a) supra.

(34) (1820) 5 Wheat. 385.

(35) The Valeria [1921] 1. A.C. 477 at 485. See also the case of the Dusseldorf [1920] A.C. 1034. and the American case of the Florida (1879) 101 U.S. Reports 37. Moore Digest VII s. 1334.



Precisely what damages would be allowed where the violation of the neutrality was intentional is unknown, except that costs would appear to be allowable in addition to simple restitution. The point has been raised but not settled. (36)

XI. Oppenheim's definition of neutrality postulates duties imposed upon the neutral as well as rights conferred. (37) If the fundamental right of the neutral State is to be allowed to remain at peace with all nations, it is the correlative and insistent duty to maintain a strict impartiality and to recognise the rights of the belligerents. Circumstances may arise where the neutrals combine to refuse these rights and the belligerents are unable to enforce recognition as in the present Spanish Civil War but such instances arise only from political expediency not from law. Whereas, the neutral is entitled to take measures for the defence and security of the State and the preservation of its neutrality, such measures, especially those which are discretionary, must be impartial in their operation. The notorious breach of neutrality by Sweden in closing the Koggrund Channel leading to the Baltic forcing the Allied ships to use the outer channel which was closely patrolled by the enemy, has already been noted. (38) The neutral State may not allow its territory or waters to be used as a base for military operations nor allow assistance to be granted thereon for proximate acts of war. On the other hand, the neutral, although at peace and on the friendliest terms with the belligerents, is entitled to/

(36) The Dusseldorf [1920] A.C. 1034.

(37) Hague Conference Reports p. 841.

(38) Parl. Papers. (1917) Cmd. 8478.

entitled to close the territorial waters and ports to vessels of war in the interests of its own safety, and even to deny to belligerent vessels the asylum and protection of a friendly power. In the absence of a definite closure, however, the ports and waters of the neutral may be used by belligerent vessels subject to the restrictions imposed by local regulations and international law. Such, generally, are the duties directly or indirectly imposed upon neutral States in respect of their territorial waters and sanctions at the option of the belligerents are admitted by international law in the event of wilful failure or negligence on the part of the neutral State.

XII. As an ancillary means of enforcing the national duty of impartiality, a neutral State may, but is not required by international law, ~~to~~ prescribe the rules, neutrality laws, to be observed by the subjects and others within the jurisdiction. These rules, while purporting to be the national interpretation of international law, vary greatly from country to country. In Britain, the first real neutrality law was the Foreign Enlistment Act, 1819, <sup>(39)</sup> which, on being found defective, was replaced by the Foreign Enlistment Act, 1870. <sup>(40)</sup> This Act has been supplemented as occasion required by proclamations of neutrality suitable to the circumstances of the time and recently by the Merchant Shipping (Carriage of Munitions to Spain) Act, 1936.

In the United States, the common law proving inadequate, the first Neutrality Act was passed in 1794 and, like the British Act, has been replaced by more adequate provisions in the Act of 1800. These/

(39) 59 Geo. III. c.60.

(40) 33 & 34 Vic. c.90.

These American statutes are important in the history of the law of neutrality as they prepared the way, by setting up a higher standard than that previously observed, for many of the now accepted rules of international law as to the duties of neutrals in maritime war. As in Britain, these statutes are (41) supplemented by neutrality proclamations. In the recent legislation of both countries there is intentional firming of the attitude of impartiality.

XIII. In other States the practice varies; some issue proclamations of neutrality with little or no detail and rely almost entirely upon international law and the municipal law where (42) applicable. As neutrality is a relationship between States, the situation is governed by international law and not by municipal law: the proclamations of neutrality are but the national view of what international law is ( or ought to be) and their validity, in a question with belligerent States, is to be judged by the standard of international law. National legislation cannot (43) per se expand or contract the obligations of neutrals. Nevertheless, if a higher standard is prescribed in municipal law, it is in the option of the belligerents to hold the neutral to it. Voluntary conventions between all parties as to the conduct of neutrals are of course binding.

XIV. The primary obligations of a neutral to see that his territory/

(41) Pitt Cobbett ll. 509; Wheaton ll. 971; Moore Digest vii. s.1320; International Conciliation 1928 p.364 et seq.

(42) Pitt Cobbett ll. pp. 511 & 512; Moore Digest vii. s.1319. Garner-International Law ii. 419.

(43) Moore Digest vii. s.1291. (44) Moore Digest 1301-1305.



X territory is not used as a base for military operations and that assistance for proximate acts of war is not rendered to the belligerents are frequently indistinguishable. Furnishing military aid, which is prohibited, is to be distinguished from granting limited assistance to men of war which have entered the neutral jurisdiction to obtain sufficient supplies to carry them to their nearest home port. The prohibition extends to the ~~original~~ <sup>initial</sup> fitting out or arming of a vessel for belligerent purposes. This is strictly forbidden by the American neutrality laws, (45) and the British Foreign Enlistment Act, 1870. Art. 8 of (46) the Hague Convention XIII of 1907, which now governs the matter, is to the following effect:

"A neutral power is bound to take full notice of and to prevent the departure of a ship which has been fitted out or is thought to be fitted out to prey upon the shipping of another State at peace with the State. It is also required to prevent the departure of a vessel which has been in whole or in part equipped within its jurisdiction for the purposes of war."

This rule originated in a British protest against the preferential facilities claimed by France in 1793 to enlist men and to commission vessels in the United States. The latter held that the raising of forces within the jurisdiction was an exclusive right of sovereignty and denied the claim. (47) Hall noted that the stand taken by the United States constituted an advance in international law although it represented popular opinion of the time; it is now the accepted standard in law.

(48)  
The British Government, in the Terceira incident, took a similar/

(45) Moore Digest VII. s. 1294. (46) 33 & 34 Vic. c.90 ss. 10 & 11  
(47) Moore Digest VII. s. 1295. (48) Phillimore III. p. 287



similar view. They took a further step when they accepted and  
 agreed to be bound by the Treaty of Washington, 1871, although  
 the principles stated in the treaty were novel and not recognised  
 as rules of international law at the time of the Alabama incident.  
 which occasioned the treaty. Nevertheless, despite the novelty,  
 the British Government agreed to be judged upon the basis that a  
 neutral nation was bound to exercise due diligence to prevent the  
 fitting out by subjects, within the ports, of vessels for sale  
 and intended to take part in belligerent operations. Into the  
 unsatisfactory aspects of the treaty and of the subsequent arbit-  
 ration<sup>(50)</sup> it is now unnecessary to enter for today the soundness  
 of the principles enunciated in the treaty would not be questioned.

XV. The difficulty is the application in practice of the rules  
 that material assistance must not be rendered by the neutral to  
 the belligerents<sup>(51)</sup> nor the neutral territory used as a base. Thus  
 it is possible for neutral subjects to trade in arms (unless pro-  
 hibited by municipal legislation the effect of which is not con-  
 sidered here) with a belligerent even although the other party  
 may, by force of circumstances and the fortunes of war, be preclud-  
 ed from taking advantage of the market: yet the neutrals may not,  
 as a commercial venture, undertake to build warships for a belli-  
 gerent. When, therefore, Germany and Austria protested to the  
 United/

(49) Appendix 19; Parl. Papers. North America No. 1. (1873) p. 3.

(50) Pitt Cobbett 11. 469; Birkenhead 312; Wheaton 11. 983

Lorimer 11. 159; For rules to be applied see appendix 19.

(51) Westlake 11. 251; Hyde 11. s. 870; Wheaton 11. 934-6;  
Lorimer 11. p. 161. whose opinion on this point is strongly  
 endorsed by Rolin Part 3, p. 188.

United States, while still neutral during the war of 1914-19, against the shipment of arms and munitions to the Allies, the United States replied that they were but following precedent and were not required by international law to prohibit their subjects from exporting arms. <sup>(52)</sup> <sup>(53)</sup> Hall considers this trade by the subjects of the neutral State to be perfectly legitimate on the grounds that States do not usually engage in such trade and the same duties of impartiality are not imposed upon subjects. The latter are entitled to continue, subjects to the hazards of war, their trade with the belligerents. <sup>(54)</sup> The distinction between the supply of arms and the supply of fighting craft is historical and accidental. The licence to trade in arms, being now sanctioned by Article 7 of the Hague Conventions Nos. V and XIII of 1907 must be admitted as a right continued in international law. Nevertheless, it must be recognised that the attitude disclosed in municipal legislation and conventions towards this matter of the supply of munitions to belligerents is undergoing a change, a change which is tending to eliminate the distinction between naval vessels, arming of expeditions on the one hand and the supply of munitions by private citizens on the other.

For the purposes of this essay, however, the material point is that the licence to trade in arms does not permit the neutral subject to throw munitions of war and other supplies into a belligerent/

(52) International Conciliation (1928) p. 396; Wheaton 11. 970

(53) p. 712; see also Rolin Part 3. p. 64. Lorimer 11. p. 131.

(54) Oppenheim 11. 544; See Smith and Sidley pp. 429-436 for a full discussion of the earlier authorities.

belligerent warship within the neutral jurisdiction. Actual  
 delivery, if the neutrality of the State is to be maintained,  
 must be made outwith the neutral State. Within the neutral  
 jurisdiction, the State is sovereign and the belligerent has no  
 right of visit and search. The right may be exercised on the  
 high seas up to the very limit of territorial waters and the  
 neutral cannot complain of the exercise as illegal. The belli-  
 gerent has thus a right and, according to the fortunes of war, a  
 possible means of preventing the assistance being afforded to  
 the enemy. It is otherwise with assistance actually rendered  
 within the neutral jurisdiction. There, the belligerent must  
 rely, in the first place, upon the neutral sovereign ensuring  
 that no assistance is directly afforded to the enemy within the  
 neutral jurisdiction.

XVI. The amount of supplies and fuel which may be allowed to  
 belligerent vessels by neutrals must be limited, as otherwise the  
 fighting efficiency of a warship would be restored and the neut-  
 rality impaired. According to Arts. 19 and 20 of Convention XIII,  
 a belligerent warship may be supplied with sufficient fuel and  
 provisions for the crew to take her to the nearest port and  
 may not be again supplied in any part of the neutral State within  
 the next three months. Arts. 19 and 20 were not ratified by all  
 the States parties to the Convention and, therefore, the provis-  
 ions are not binding. Thus, much is left to the discretion of  
 the neutral. The intent, however, is clear; it is to prevent

(55) See Garner Inter. Law 11. 443 re complaint by United States  
 against the hovering of British ships outside American  
 territorial waters.

(56) C.f. Hall 97.



the neutral territory being converted into a base for military operations. (57) The issue was raised in the Russo-Japanese War by the provisioning on a liberal scale at the French ports of the Russian fleet on its long voyage from Libau to Vladivostock to engage the Japanese. (58) The provision of supplies when effected in the neutral jurisdiction can be controlled but control is much more difficult when the supplies are taken out by ships, chartered in the ordinary course of trade and possibly clearing with false papers, to transfer the cargo upon the high seas. This practice, if extensive, would convert the territory into a military supply depot. The point is not without importance as both German and British vessels in the Pacific during the war of 1914-19 obtained supplies locally over a prolonged period. The American and Chilean Governments took the view that there had been a violation of the spirit if not the letter of international law and took steps to prevent further breach of their neutrality. (59) The neutral State has no right to infer evil intent from a single innocent act performed by or on behalf of an armed force or vessel; but if the act has been performed several times and has always prepared the way for warlike operations, it may fairly be assumed that a like consequence is intended in all subsequent acts. These should be prevented as they will intensify the breach of law. (60)

XVII./

---

(57) Hague Conference Reports. pp. 86.2

(58) Hall 725. The British instruction were to allow only sufficient fuel to carry the vessels to a home port or some named nearer neutral destination. Smith & Sidley 134 & 494-8.

(59) Pitt Cobbett 11. 484.

(60) Hall. 725 'The minnum number of repetitions constituting the offence cannot of course be determined'. Wheaton 11.965.



XVII. As neutral territory may not be used as a base of military operations, so it is not permissible for a belligerent to set up prize courts in territorial waters . A neutral State is bound to see that its neutrality is respected. The rule as to the non-establishment of prize courts in neutral territory was not always recognised.<sup>(61)</sup> Sir William Scott, however, in the Flad Oven<sup>(62)</sup> held that to set up judicial tribunals within neutral territory was contrary to the usage of nations and inconsistent with the principle that prize proceedings being always in rem, it was necessarily presumed that the substance of the thing was in the country of the belligerent captor. A similar principle was adopted by the United States in the case of the Betsy<sup>(63)</sup> and the power to set up prize courts in the neutral United States was denied France.<sup>(64)</sup> It would appear, however, that it was the locus of the court which was material and not the place of detention of the vessel.<sup>(65)</sup> The act of sovereignty, the constitution of a court of law, within another sovereign jurisdiction is clearly invalid and not to be compared with consular tribunals in an alien country dealing with domestic disputes as between nationals.

The legitimacy of the practice of disregarding the place of detention of the prize was endorsed by Art. 23 of the Hague Convention XIII but reservations were made by the United Kingdom, United/

(60) Contd. 'Continued use is, above all things, the crucial test of a base', Holland quoted by Smith & Sidley. p.497.

(61) Wheaton 11. 964; Benton v Brink (an early Scottish case) (1761) Morrison. 11949.

(62) (1799) 1. Ch. Rob. 135. (63) (1794) 3 Dallas 6.

(64) Moore Digest. VII. s.1295.

(65) Henrick and Maria 4 Ch. Rob. 43; Hudson v Guestier (1808) 4. Cranch 293. See appendix 10 where the Scottish Admiralty Court followed English precedent.

United States, Japan, and Siam. It would therefore appear that, so far as Britain is concerned, both the prize and the court must be within belligerent jurisdiction.

XVIII. Art. 5 of the Hague Convention XIII prohibits the erection by belligerents of wireless stations or other means of communication within/neutral territory or waters for communication with belligerent forces. It is not that the neutral is prohibited from using or permitting the stations within the jurisdiction to be used for communication with the belligerent powers. By Art. 8 of the Convention No.V, " the neutral Power is not called upon to forbid or restrict the use on behalf of the belligerents of telegraph or telephone cables, or of Wireless telegraphy apparatus belonging to it, or to companies or to private individuals." The prohibition is confined to the establishment of stations before or during war for purely  
(66)  
military purposes and communication with the military forces. It is the duty of the neutral to see the prohibition is effective even to requiring all wireless apparatus on vessels in  
(67)  
territorial waters to be dismantled.

XIX. A neutral State is under no absolute obligation to afford an asylum to those belligerents who may flee into the neutral territory; it is optional but, if granted, it must be with strict impartiality. Men of war may be excluded in time of peace and therefore in time of war. The privilege of asylum,  
when/

---

(66) Art. 3 Hague Convention. No.V.

(67) Garner Inter. Law. 11. 410 et seq. and Wheaton 11. 933-4 for breaches of neutrality in this respect during recent wars.

(68)

when conceded, is usually regulated by municipal rules. Conventional provisions of international law are contained in Arts.

9 and 12 of Convention XIII but they draw no distinction between belligerents seeking shelter from ordinary distress and those in flight from a superior enemy. Belligerent vessels are entitled to the usual privilege of stay of twenty-four hours or such longer time as may be necessary to execute the repairs allowed by the neutral. These repairs must not be of such a nature or extent as to restore the fighting efficiency of a ship crippled in battle but merely such as will enable it to reach the sanctuary of a home port. The distinction has been described as between 'civilian' or 'navigation' and 'military' repairs. It is impossible to define these terms closely and

(69)

each case must be considered on its merits. In unexceptional circumstances and in the absence of a local regulation, a warship of a belligerent may be allowed to stay no longer than

(70)

twentyfour hours in a neutral port. This is known as the rule of "twentyfour hours stay".

XX. The neutrality of a state is not violated by the passage of belligerent vessels through its territorial waters but it is in the option of the neutral State to prohibit or to regulate

(71)

impartially the passage of such vessels in these localities. Submarines present a special difficulty and it has been questioned whether they should be admitted to the privileges of surface craft. In August, 1916, the Allies proposed to the

neutral/

---

(68) Oppenheim 11. 579-90; Garner Inter. Law, 11. 419-430 considers this a 'right' of asylum.

(69) Pitt Cobbett 11. 485 -6; Wheaton 11. 995-6;

Oppenheim /



neutral powers that no asylum be granted to submarines. Submarines differ from the ordinary surface craft in that they may escape observation and control by submerging and their national character may be difficult to establish. There was no uniformity of practice during the war of 1914-19. The United States rejected the Allies' proposal and admitted German submarines to

(73)

territorial waters; Norway, by decree of 13th October, 1916, and Sweden, by decree of 19th July, 1916, forbade all belligerent submarines from entering territorial waters except by reason of force majeure; and Spain by decree of 29th June, 1917,

(74)

prohibited entry under any circumstances. The variety of practice merely emphasizes the discretionary power of the neutral to regulate, with strict impartiality, the passage of belligerent warships through the territorial waters. The law as to submarines cannot be said to be clarified by the Washington Treaty of 1922.

(75)

XXI. There is a further rule of international law as regards warships in territorial waters, viz., the rule of twentyfour hours interval. Apart from the exception as to lengthened stay for the purpose of repairs or refuelling where the local regulation prohibits refuelling before a ship has been within the port a certain period, .e.g., twentyfour<sup>hours</sup>, the stay of a belligerent/

(69) Contd. Oppenheim 11. 591; Garner Inter. Law 11. 422-4.

(70) Hague Convention No. XIII Art. 12. It was not recognised by Germany during the war 1914-19. Garner Inter. Law 11. 421

(71) Hague Convention No. XIII. Art. 10.

(72) (1916) Cmd. 8349.

(73) Cmd. 8349; Fauchille 11. 1463; Garner Inter. Law 11. 431.

(74) Oppenheim 11. 573; Hall 754.

(75) Parl. Papers. (1929) Cmd. 1627.



Belligerent vessel within the neutral jurisdiction may be further regulated to allow an enemy vessel which has entered previously to have a start of twentyfour hours before the second is allowed to depart. In its earliest form, this rule was the start of two or three tides mentioned in the Stuart proclamations of neutrality. The modern precise limit of twentyfour hours is dated from the Tuscarora and the Nashville incident when the former practically instituted a blockade of the latter in (76) British territorial waters. The rule was adopted in the Suez Canal Convention and in the Treaty between Britain and the United States regarding the Panama Canal. It is now embodied in Art. 16 of the Hague Convention No. XIII and is commonly known as the 'rule of twentyfour hours interval'. In the event of the warship failing to depart as required, the vessel must be disarmed and rendered incapable of proceeding to sea and the (77) crew interned. Prisoners of war are also to be released.

XXII. Protection may also be afforded on somewhat similar conditions to prizes brought into the port of a neutral on account of unseaworthiness, stress of weather or want of provisions or fuel but the hospitality of the port must not be abused. Thus/

---

(76) Pitt Cobbett ll. 478-9. (77) Westlake ll. 237.

(78) Art. 21. Hague Convention No. XIII. See Garner p. 233 for an interesting case, the Sudmark, taken prize but detained for a night in the territorial waters of the flag State, and not thereby released under the jus postlimini. As an isolated case the decision is of doubtful weight as indicating a rule of international law.

Thus it may not be assumed that, even where there is a prior convention or treaty to this effect, a prize may be taken to a neutral port for detention for the duration of the hostilities. (79)  
The prize must be released and the crew interned.

Under the customary law, it was within the discretion of the neutral State as to whether prizes should be admitted. Pitt Cobbett<sup>(80)</sup> considers that the admission of prizes should be not be allowed except when in distress. The vessel is outwith the jurisdiction of the neutral State but has not yet been adjudged just prize to the captor. The British rule, first adopted in 1861 and followed since is to exclude prizes altogether except in cases of distress.<sup>(81)</sup>

XXIII. The responsibility of the neutral States does not extend to every unneutral act which may possibly take place within its jurisdiction. The Treaty of Washington<sup>(82)</sup> of 1871 required that the neutral State exercise due diligence to prevent the breach of neutrality. The standard of 'due diligence' is unsatisfactory. To what standard is it to be related? The discussion of the point before the Geneva arbitration tribunal and the decision of the tribunal showed how unsatisfactory was the criterion or standard of 'due diligence'<sup>(83)</sup> and a serious divergence of views upon the point. Equally unsatisfactory, in the writer's opinion, is the standard suggested by some publicists, as being that of good will and good faith, both necessary elements, or the standard of care/

(89) The Appam (1917) 243 U.S. 124. See Garner. Inter. Law 11. 438-9 for instances of abuse of Chilean territorial waters.

(80) Pitt Cobbett 11. 491; Wheaton 11. 1005

(81) As to the policy of Italy, Japan and other States see Wheaton cit. sup.

care taken by the prudent party in his own affairs. They are equally vague. Art. 25 of the Hague Convention No. XIII which now governs the matter, merely requires that the neutral State use all the means at its disposal to prevent the breach of its neutrality, a rule and standard of conduct of easy application. This in substance was the British thesis maintained before the Alabama Claims Commission.

XXIV. So much is it the duty of the neutral to observe a strict impartiality, including the prevention of the use of the territory as a base of operations, that sanctions are permitted by international law. Some remedies are primarily at the instance of the neutral State and only indirectly, if at all, at the instance of the belligerent wronged by the negligence of the neutral, e.g., the release <sup>by the neutral</sup> of prizes taken in violation of the neutral sovereignty and found within the jurisdiction or by demanding the release of prizes <sup>detained</sup> elsewhere. <sup>(85)</sup> The measure of the neutral's responsibility, however, being to use all the means at his disposal to prevent the violation of his neutrality, where the State is relatively weak and the coast line long and broken, circumstances may be such that the belligerent, without in any way compromising the neutrality, may assist by interposing to effect/

---

(82) Appendix 19.

(83) Parl. Papers. North America No. 2. (1872) U.S. case at p. 41 and No. 3 British counter case p. 21. Wheaton 11. 987.

(84) Wheaton 11 987; Oppenheim. 11. 618.

(85) See ante pp. 263 et seq.



effect his own remedy. Such action on the part of the belligerent is of the nature of vicarious enforcement of neutrality against which neither the neutral nor the other belligerents can complain. On the other hand, where the violation of the neutrality has been deliberate and the neglect of the neutral State wilful, the ultimate sanction always open to the wronged belligerent is a declaration of war against the offending neutral, though expediency, which is outwith the scope of international law, may dictate another course. (86)

XXV. It<sup>is</sup> sometimes said by writers that, where the belligerent vessel seeks to rely upon its own power for protection rather than upon the neutral State in whose territory it may be, the neutral State is freed from further responsibility. These opinions are based upon the arbitral award in the case of the General Armstrong, an American privateer which was destroyed by a British squadron in the Portuguese port of Fayal. The award was against the United States on the ground that the ship had not sought the protection of the local authorities before and in anticipation of hostilities. The writer agrees with Oppenheim that it would be unwise to found upon this one instance as formulating a rule of international law. It may be that the neutral is freed from further responsibility where the local sovereign is able to afford adequate protection and a belligerent/ (88) (89)

(86) The 'benevolent' neutrality of the northern European States towards Germany during the war of 1914-19 called forth numerous protests by the Allied Powers who might have taken but refrained from other measures. Oppenheim 11. 493. (H. L. W. N.)

(87) Hall 747; Pitt Cobbett 11. 416.

(88) Moore Digest VII. s. 1335.

(89) 11. p. 498; Westlake 11. 232; Birkenhead 316.



belligerent commences hostilities within the neutral jurisdiction under the mistaken impression of having the advantage over the enemy. But, apart from this, the neutral is entitled to claim that the neutral jurisdiction be respected and the rule which would be drawn from the precedent of the General Armstrong is not to be lightly advocated. <sup>(90)</sup>  
<sup>(91)</sup>

XXVI. Vicarious enforcement of neutrality and self redress at the instance of a belligerent are, when restrained within due bounds, indistinguishable. <sup>(92)</sup> The neutrality is only violated where excessive measures have been taken. Of this two illustrations may be given. In the first, the destruction of the Russian ship, Ryeshitelni, which had sheltered in the Chinese (neutral) port of Chefoo, the Japanese acted under the mistaken impression that the local authorities were only conditionally neutral and had failed to disarm the vessel. <sup>(93)</sup> This was a violation of neutrality by the Japanese. The second instance, that of the Dresden, is illustrative of self-redress with moderation.

The German cruiser Dresden, having sought refuge in Cumberland Bay within Chilian waters, was denied a stay of eight days for repairs and allowed only the usual twentyfour hours stay. Five days later, when a British squadron appeared before the port, the Dresden was still flying her colours and had her guns trained/

---

(90) The Anne 3 Wheaton 435.

(91) See Moore Digest VII.s. 1335 for early examples of violations of neutral territory and their repercussions.

(92) Pitt Cobbett ll. 420 while anticipating that a distinction should be drawn does not appear to differ substantially from this view. See also Stowell 312.

(93) Pitt Cobbett ll. 420 Smith and Sidley pp. 116-8.

trained. She refused to surrender and the British opened fire, whereupon the vessel was blown up. Upon the protest of the Chilian Government, Great Britain apologised but pointed out that in this and other instances the Chilian Government had been unable to enforce its authority to maintain its neutrality and the action of the British commander was not unwarranted. (94)

XXVII. As a rule, the sanction applied by the belligerent wronged by the neglect or impartiality of the neutral is effected through diplomatic channels and may vary from a formal protest and requirement of an apology in the less serious delinquencies to a declaration of war where the wilfulness and the seriousness of the breach of neutrality is considered to oblige such an act. The duty of the neutral State is to make reparation and the ultimate sanction of international law is war. (95)

---

(94) (1914-16) Cmd. 7859.

Garner ll. pp. 420-1 describes the Dresden incident as "the most flagrant violation of Chilian neutrality" but it is clear from the previous instances mentioned by him that the local authorities were too weak to prevent the German vessels from making Chilian territory a base of operations. The Chilian Government protested to Germany against the prolonged stay of the Dresden and its failure to disarm a fact which the German Government did not deny but held to be justified. In such circumstances the British commander appears to have been justified by law in the action he took.

(95) Oppenheim ll. 405; Hall 747.

LETTER of ERIC, XIV. King of Sweden, etc., to MARY, Queen of Scots, relating to recent practice of certain merchants, including some of the Queen's subjects, to exercise a right of navigation to parts of Muscovy subject to the King contrary to his interdict and the Emperor's.

Letter dated Stockholm, 22nd October, 1562.

(G.R.H. State Papers, Norway and Denmark, No.6.)

ERICUS Decimus quartus Dei gratia Suecorum, Gothorum, Wandalorumque Rex Serenissimae Principi, Dominae Mariae Scotiae Reginae, Sorori et consanguineae charissimae, Salutem et omni bonum nec non mutui amoris incrementum. Serenissima Princeps, volumus pro mutua internis amicitia Serenissimam Vestram colare, mercatores quosdam annis iam hisce proxime elapsis navigationem contra veterem consuetudinem, et civitatum aliquarum privilegia ad loca Muscovitis subiecta exercere illisque omnis operis merces bellicue apparatus apportare caepisse. Nos autem cum navigationem illam nostris auiditis plurimum damno futuram prospiceremus interdicendam duximus, quod et superiori proxima hieme omnibus illis significavimus, qui ad mare istud Germanicum sive Sarmaticum habitant eoque navigaturos potissimum arbitrabamur. Sic uti eandem navigationem Imperii Romani Caesar pariter nocituram Orbi Christiano cum intelligerit, non ita pridem etiam prohibuerat contra quam nostram et Caesareae Serenitatis prohibitionem aliqui tamen pertinari avaritia inducti navigationem eandem attentare adhuc nihilominus ausi sunt qui a nostris in mare ob id Thalassiarchois et ex invitoribus aestate hac elapsa intercepti sunt, quorum in numero aliqui ex serenitatis Vestrae gentis hominibus etiam fuisse memorantur virum illos proea quae nobiscum, Serenitatis Vestrae, intercedit amicitia, suis cum bonis impune hoc tempore ut abire nostri sinerent mandavimus. Caeterum cum ex officio teneri nos scimus, subditorum nostrorum commodo et utilitate ut consulamus, et illorum detrimenta seu incommoda tempestive quoque avertamus et quoad fieri a nobis queat propulsemus nobis preterea ius ac potestas sit, non minus in mare, quod ad nostrum spectat dominium, quam in terra, nobis nostrisque incommodum et utilitatem, libere ordinandi ac disponendi. Accedit quod nostris Revaliae nunc subditis polliciti simus, sua illis privilegia vos conservaturos esse inter quae hoc vel precipuum ab Imperatoribus et regibus olim illis concessum continetur, ne ullis mercatoribus potestas sit ultra Revaliam et Wiburgum illic in mari suis cum mercibus navigandi. Sed quotquot propter Muscoviticas merces alicunde ad loca illa navigaturi veniant, suas Revaliae vel Wiburgi naves exonerari et aliis ibidem mercibus ex Muscovia illuc advectis vicissim onerari facere teneantur quibus privilegiis recens et inusitata haec navigatio nunc quasi ex diametro pugnare videtur. Idcirco denuo

apud/



apud nos conclusimus, factum super hac re priuscum a nobis tum a sani imperii Caesare prohibitionem ratam omnino nos velle prestare, et nullo pacto permittere, ut impune quis ultra Revaliam vel Wiburgum eo in mari naviget. Ut igitur Serinissimae Vestrae subditis cuius nos amicitiam plurimi facimus tempestive adhuc hac re caveatur ne viz. interdicti huius ignorance in aliquod postea incurrant dampnum vel detrimentum, sed navigationem ad loca illa prohibita omnino vitandum sciant, duximus. Serinitati hoc Vestrae litteris hisce presentibus nunc significandum esse, petimusque per amice ut ultra Revaliam et Wiburgum navigationis in hoc mari prohibitionem a nobis factam omnibus iis denunciari publicarique facere, Vestra Serinissima non gravetur qui eiusdem Vestrae Serinitatis in Regno Muscovitico ob merces in mare istud Samarticum navigare in animum inducat ne si contra interdictum alterius progrediantur a nostris eo in mari tunc exhibitoribus interceptantur damnumque patiantur. Et ne occasionem de nobis conquerendi ullus habeat quod viz. mercaturae illis in locis exercendae commoda per hoc interdictum intercipere studeamus, conclusum est nuper in pactis foedere quod cum Mosco ad plurimos annos duraturum pepigimus ut suas eius subditi merces iuxta veterum consuetudinem Revaliam et Wiburgum libere vehant ibidemque illas dividant et nostris Revaliae et Wibugi habitantibus vicissim integrum sit ad portum Narven et loca vicina proficisci et inde ad sua merces reportare, et mercatoribus undecunque ad eos venientibus veteri more distrahere. Proinde poterunt et minore cum periculo et tanto fere cum fructu ac emolumento Revaliam vel Wiburgum navigare qui merces querunt Muscoviticae quam si Narven ad aliave Muscovitis loca subiecta navigarent propterea quod et navigatio Revaliam et Wiburgum usque multo brevior sit, et portus minus difficilis vel periculosus quam qui est Narve quod Serinitatis Vestrae subditis significari per amice cupimus Serinissima Princeps soror et Consanguinea charissima, cupimus a Deo Opi. Max. ut eandem Vestra Serinitatis ad sui suorumque salutem perpetua prosperitate conservet. Datum in Regia nostra urbe Stockolmina 22 Octobris Anno Christi MDLXII.

VESTER BONUS FRATER et CONSANGUINEUS

ERICUS.

Ad mandatum Regiae

Serinissimae Principi Dominae Mariae Scotiae  
Reginae Sorori et consanguineae Nostrae Charissimae.



## APPENDIX

2.

EXTRACT from Charter confirming Earl of Bothwell in  
Office of ADMIRAL of SCOTLAND.

Reg. Mag. Sig. V. 1316. 29th July, 1587.

Holyrood House, 29th July 1587.

x x x x x x x x

et eisdem de novo dedit officium et jurisdictionem marne  
admiralitatís regni sui omniumque insularum et bondarum ei  
spectantium, tam Orchadie, Zetlandie, lie Skye, Lewis, insul-  
arum, occidentalium nuncupat. Hebriden., quam aliarum insul-  
arum, lacuum et bondarum gegi pertinen. infra fluxum maris et  
50 milliaribus maris easdem circumdantis, cum officiis locum  
tentis et justiciarii generalis per mare et supra omnes regis  
exercitus navales et classes tempore belli et pacis, ac judi-  
cis criminalis et civilis omnibus leigis et extraneis amicis  
et inimicis in omnibus actionibus super mare commissis, et  
inter mercatores liegios aut extraneos, et inter extraneos et  
extraneos concernentibus merchimonia, piscaturam, bellicos  
apparatus, piratas, contractus, obligationes et condiciones  
fact. inter dictas partes tam infra regnum quam extra, ac  
super violatores legum regni penes transportatores et regrat-  
arios victualium, carnis, feni et aliorum prohibitorum et  
non custumatorum bonorum extra regnum, adeo libere quam qui-  
cunque admiralli regnorum Gallie, Hispanie, Anglie, Danie, aut  
aliarum extranearum nationum exercebant dictum officium,  
secundum jura regni sui et dictarum nationum, que jura rex  
ordinavit suum admirallum, vice-admirallum et deputatos sequi,  
imitari, colligere, et imprimi facere ut practicarentur in  
futurum; - dando dicto admirallo dictum officium cum decimo  
denario omnium navium et mercium interceptarum tempore belli,  
et preterea piraticarum navium et bonorum, bonorum ejectorum  
et pro derelictis habitorum (wrak et wreth gudis) de mare  
recuperandorum, duas partes ipsi admirallo et tertiam partem  
conventoribus et apprehensoribus applicandas (bona vero  
justorum mercatorum a piratis intercepta, ubi nemo proprietar-  
ius presens ea sibi postularet, intromittenda, inventarium  
de eis faciend., et in secura custodia ponend. super expensis  
eorundem, veris dominis restituend. intra spatium anni et  
diei, quo spatio elapso et nullo postulante, liceret dicto  
admirallo ea propriis usibus applicare); et sic de bonis  
cadentibus sub eschaeta, dimidiam partem regi et thesaurio  
importandam alteram dimid. admirallo applicand.; cum postate  
(inter alia) assisas halecum et aliorum piscium in insulis et  
lacubus capiendorum (ubi nulla fuit hereditaria dispositio)  
levandi earumque dimidium regi, dimid. admirallo applicandi,  
navigia bellica et custodias ex liegiis habitantibus infra  
miliare ad ipsum mare dirigendi, super litoribus totius regni  
demonstrationes lie musturis faciendi, ordinationes pro  
preservatione /

preservatione litorum ab invasione prescribendi, numisma aureum de qualibet navi infra regnum per liegios vendita aut extra idem empta (majus aut minus juxta valorem navium) levandi, et hoc ab emptoribus, sicuti ballivus marinus (watter baillie) Edinburgi aut Lethe infra bondas earundem levare solitus est, absque cujus numismatis solutione emptio et venditio nullius essent effectus, brevia marina lie sie brevis, licentiae lie pasportis, certificationes et alias litera testimoniales sub sigilio admiralitatis dirigendi;

x            x            x            x            x            x            x            x

## APPENDIX 30

EXTRACT from the CONTRACT between PATRICK, EARL of ORKNEY and the COMMISSIONERS for the BURGHS of ANSTRUTHER, CRAIL, and PITTENWEEM.

(Recorded in the Register of Deeds, Vol. 46, fol. 38A  
in H.M. General Register House, Edinburgh.)

September, 21st 1594.  
Edinburgh.

..... The noble Lord "for ~~the~~ avoiding and stenching<sup>of</sup> all controverseis, playis and questionis that hes ~~arissen~~ or may arryse heirefter betwixt the saidis parteis and thair successouris and to the effect that the inhabitantis of the saidis townes and thair successouris may peaceablie use and exerce thair traffick of fisching within the saidis countreyis for payment of the dueteis efter specifeit peaceablie in all tymes <sup>thair fore</sup> coming the said nobill lord.....grantis full licence, libertie, freedom, facultie and power to the inhabitantis and indwellares of the saidis townes of Craill, Anstrutheris, and Pittenweem and thair successouris that shall happin to fische within the saidis countreyis of Orkney and Zeitland .....and use thair traffick of fisching within the same, big fischearis houses..... for the making, packing, drying and wyning of fische that they sall happin to slay."

The burghs were to be able to buy ale and pass and repass but they were not allowed to fish with "greit lyneis within the heidlandis of the saidis cuntreyes....and sall nawayes slay small fische within the soundis and wrayis thair- of bot sa mony as may serve to be thair bait ressonablie in tyme cuning".

They were to do no injury to the inhabitants or their stock and do no "wring, injurie or oppressioun to ony strangerris being within the saidis cuntreis as Englishmen, Druchemen, or utheris, or trubill thair schippis or guidis in ony sort by ordour of law:

For the quhilkis causes the inhabitantis of the saidis townes respective and thair successouris that sall happin to fische within the saidis countreyis of Orkney and Zeitland or ony part thair of sall pay to the said nobill Lord yeirlie the dueteis efter specifeit".

Then follows a scale of charges for fishing with great lines, ground leave within the floodmark and ground leave above the floodmark.



APPENDIX <sup>4</sup> N.

(a)

EXTRACT from the TREATY of BINCHE, 1541.

(Dumont. Vol. IV 208. 19th February, 1540/41.)

.....Et quant du dernier Article de la Commission du Sr de Limdy, Ambassadeur, concernant le fait de la Pescherie, ladite Dame Reine veuille par bonne & meure deliberation proceder antelles & semblables affaires, se sera informer sur le contenu dudit Article, pour apres en ordonner comme il sera trouve estre de raison, equite & justice d'une part & l'autre pour la conservation de la Paix & Amitié mutuelle desdits Sieurs..... ils seront deliberer les lettres pertinentes, le tout en dedans l'espace de six mois prochain apres la datte de celles.

(b)

EXTRACT from the TREATY of BINCHE - 1550.

(Convention of Burgh Records, Vol.II. p. 570. The Latin version, in full, is given in Dumont Vol. IV under date, 15th December, 1550. The confirmatory agreement of 1594 is given also in Dumont, vol. LV. pp 21 & 22.)

ITEM. If any damage or hurt should be done by the tributaries, vassals, and subjects of the one party to the countries, kingdoms, vassals, tributaries or subjects of the other, in their persons, or goods, on land or on sea, in that case, that party shall be bound to compel the guilty to reparation and restitution with effect to the party lesed; and that conform to a certain contract and agreement betwixt Mary, Queen of Hungary and Bohemia and Governess of the Low Countries for His Imperial Majesty, and John Campbell, Ambassador of King James, lately deceased, anno 1541, and afterwards confirmed by the said King, And both parties should be at pains that the pirates of whatsoever nation or kind should be wholly extirpate from the sea and the shores of the kingdom of either party, nor should they be received upon any terms into the lands or bounds of either party; and they should be bound to keep and defend the islands and districts of their jurisdiction against the incursion of whatever robbers or pirates by whom the subjects could any manner of way be damaged in their trading, navigation, and fishing. And of those who presumed to turn pirates, having no certain dwelling but betake themselves to desert islands or other unknown places, by whom the subjects of either prince should receive damage, either party at the request of the other, should be bound to betake themselves to common arms, and should not leave off until those taken had suffered condign punishment/



punishment. And they should proceed in the same manner against the sustainers and favourers, if any such were to be found in either of the Princes dominions; and as to the number and quality of ships to be furnished by the said princes when necessity required, should be treated and agreed to, and the fishing and the free use of the sea ought to be duly and sincerely observed, conform to the said treaty of 19th February, 1541.....

#### APPENDIX 5

ACT for the "Annenatioun of the property of the Crown that was nocht annexit before" .

(Scots Statutes, 1593. c.32.IV. 28(a)).

Oure Souerane Lord and Estates of the present Parliament, Considering the dailie increase of his highness's chargis and expensis and dimutioun of his highness's rents of his property and commodities through unprofitable dispositions made thair- of in tyme begane Thair of thinks expedient that the lands and lordships underwritten be annexed to the Crown and presently annexes to the Crown the same thereto following the example of his predecessors for the honourable support of his estate.....The assise of herring in the east and west seas.....

#### APPENDIX 6.

Act of 1573 Jac. VI. c.7. III. 83.

Anent the slauchter of Hering and quhyte fische and using of the samin thairefter.

ITEM. Forsamekle as it is trewlie complenit how the hail slayaris of all kinds of Fisches within the Realme not regarding the Actis maid be our Souerane Lordis derrest Predecessouris of befoir Quhilk is that quhen Hering and Quhyte Fische is slane they aucht to bring the samin to the nixt adjacent Burrowis and Townis quhair the persounis slayaris thair of dwellis to the effect that our Souerane Lordis liegis may be first servit and gif abundance occurrit that thay might be saltit transportit be fre Burgessis. Throw none doing of the quhilk our Souerane Lord is greitly defraudit of his Customes and his liegis wantis the frute of the Sey appointet be God for thair nurischment and the Burgessis and fremen of Burrowis disappointed of thair traffique and commoditie.

THAIRFOIR/

THAIRFOIR our Souerane Lord with awise and consent of my Lord Regentis grace the thre Estates and haill bodie of the present Parliament Ordainis that all maner of Fischeris that occupyes the Sey and utheris persounis quhatsumever that happinis to slay Hering or quhite fische upon the Coist or within the Ilis or outwith the samin within the Fyrthis Bring thame to fre Portis thair to be sauld commounlie to all oure Souerane Lordis liegis and the rest to fre men quhairby his Maiesteis Customes be not defraudit and his hienis liegis not frustrat of the commoditie appointit to thame be God under pane....."

# APPENDIX 7.

EXTRACT from Warrender Papers Vol. II. pp. 242, 243.  
(Scottish History Society, Edinburgh. 1932.)  
(Probably a draft. Ed.).

May, 1594.

Instructions to our trusty and weilbeloved counsallour Sir William Keith of Delneis knight gentleman of our chambre, and Captain Williame Murray(1) of Provost of our toun of St Androis, Ambassadouris directed be us toward the Generall Estates of the United Provinces in the Low Countreyis. From Strveling Castell the of May(2) 1594.

X

X

X

X

5. Ye shall also signifye to the saidis Estates that it is not unknowin unto ws quhat yearlie commoditie is reaped be the fisching in our seas neir to the Iles of Orknay and Zetland,(3) quhilk we have hitherto tollerated without stay or impediment, knowing the previledge thair of to be graunted to our umquhile predessouris amangis other heades of the treatise upon some conditions (as ye shall likewise be informed be the extractis to be had furth of our register), quhair of ye shall in our name crave the performance, and that we may be acknowledgit accordingly; quhilk being aggreable to equitye and reason we doubt not shalbe respected be thame to our contentment and satisfaction.

(1) William Murray of Pitcarleis. See St Andrews Kirk Session Register.

(2) Originally written April. On 3rd May the Privy Council passed an act in favour of Sir William Keith, on the eve of his embassy to Flanders. (P.C. V. 144)

(3) Complaint renewed at baptism of Prince. (Scots Brigade in Holland i. 166.)

8.  
APPENDIX 8.

EXTRACTS from "Report on the Union" by John Bruce.  
London. 1799.

(a)

Excerpt from the SCOTTISH ACT of 1607 ( not ratified).

"And for these native commoditeis, quhilkis aither of the countreys do zeld, and may serue, for the use & benefite of the uther, the saidis Estaittis of Scotland statutis & declairis, that thair may be transportit furth of Scotland into England, all suche waris, as ar of the growth or handywark of Scotland, without payment of ony custome, imposte, or exaction, & als frelie, in all respectis, as ony waris may be transportit, in Scotland, from porte to porte; excepting suche sortis of goodis & merchandice, as ar heireftir mentionar, being restranit for the propir & inward use of Scotland; & for that purpose declairis, that, furth of this communicatioun of benefittis & participatioun of native commoditeis of this countrey of Scotland, with the countrey of England, thair sall be specialie exceptit and result, the particular sortis, heireftir specefieit, that is to say, woll, scheip, skynnes & fellis, cattel, leather, hydis, & lynnens zairne, quhilkis ar speciale restranit, within the countrey of Scotland, not to be transportit frome the samin to England, exceptand also & reserveand to Scottisshmen, thair trade of fisheing within thair lochis, firthis, & bayes, within land, & in the seas, within fourteene mylis of the costis of the realme of Scotland, whair nather Englishmen, nor ony stranger, nor forinaris, haue use to fische."

Vol. ii. pp.clix & clx. Appendix XXII.

(b)

Proposals of English Commissioners, and Answers by the Scotch Commissioners, on the subject of Admiralty Jurisdictions.

5th and 11<sup>th</sup>. June, 1706.

The Commissioners for England proposed, on the 5th of June, that all Admiralty Jurisdiction be under the Lord High Admiralty of Great Britain, or Commissioners for the Admiralty of Great Britain, for the time being; and that appeals from the High Court of Admiralty in Great Britain, be made to the Queen, in the same manner, as is now settled in England.

The Commissioners for Scotland answered, on the 11th, that the Court of Admiralty, now established in Scotland, be  
continued, /



continues, and that all reviews, reductions, or suspensions of their sentences, in maritime cases, competent to their jurisdiction, remain in the same manner, after the Union, as now in Scotland, until the Parliament of Great Britain shall make such regulations and alterations, as shall be judged expedient for the whole Kingdom, providing, there be always continued in Scotland a Court of Admiralty, such as in England, and, for determination of all maritime cases, relating to private right in Scotland, competent to the jurisdiction of the Admiralty Court.

And the Commissioners for Scotland do further propose, that the heritable rights of Admiralty, and Vice Admiralties be reserved to the respective proprietors, as rights of property.

The Commissioners for England agreed to the proposal, touching the heritable rights of Admiralty and Vice Admiralty in Scotland, with this provision that these heritable rights, as to the manner of exercising the same, shall be subject to such regulations and alterations, as shall be thought proper to be made by the Parliament of Great Britain."



## APPENDIX 7.

CLAIM of the Scottish Burghs to the fishing at Lewis.

EXTRACT from State Papers. Dom. Chas. I Vol. 152. No.63.

1629 November 30. Uppon conference with Mr Heye Agent for the Burroughs of Scotland, concerning Lewes Iland.

(1) This hath been attempted; but yieldeth no proffit. They are not whales but Jobarts which are lesse and afford small store of oile, and indure not the boats to cum neare them.

(2) In the time of K. Jeames the 5th the Hollanders having only a verbal licence to fish at 28 miles distance cam neare the shore into the mouth of the furth of Edenborough and ther fished in despite of the Kings command. Then the King set out men of warre and tooke as manie of them that hee sent a bariful of their heads into Holland with their names fixed their forheads uppon cards. This related by the old Bishop of Rosse Linsay/

x x x x x  
About this Iland and the other Ilands adjacent there is continual fishing for white fish that is ling and cod and samon, and for herings. And the fishings here are at all times of the yeare when fisher men can brooke the seas. This fishing hath been used by the Scots above 40 years, and by them is esteemed above that of Newfoundland. Ther is also conveniences for whale fishing wherof thousands are yearly seen about the Iles(1). This fishing was not haunted or known by anie but Scotsmen before the yeare 1594, when the Hollanders began to fish in those seas uppon p'tence of a patent from King Jeames whereby they were restrained to cu within at least 28 miles of the shore, nor within the loughs, that is in the baies within the Ilands (2).

Since that year 1594 the Hollanders have come thither with all their Fleet of Busyes sometimes 3000 saile. By the laws of Scotland no stranger may fish within their seas uppon paine thei confiscation of their goods and loss of life, so the Hallanders come in against the law. They first procured the Erle Marshal of Scotland called Kyth to begge of King Jeames leave to sel to the Hollanders a litle Iland of his inheritance lying over against a harborough in Boughan called Peter Head; which King Jeames absolutely refused with protestation that no Hollander or stranger should get footing in his country whilst hee lived. This was attempted and this answer given since King Jeames cuming into England.

x x x x x

Linsay who cam in  
with K. Jeames to  
England.

-----

EXTRACT from State Papers. Dom. Chas. I. Vol. 152.  
No. 64.

Iland of Lewes.

x x x x x x

The Iland being the Erles inheritance: yet the fishing  
belongeth as they say to the Boroughs of Scotland: that  
is the fishing within the land namely at the loughs  
amongst the ylands. The sea is the Kings as al the  
rest but to the sea fishing the boroughs pretend not. By  
acts of parliament none may pack nor pil anie fish  
within the loughs but the free boroughs of the contrie.  
About a dozen towns of Scotland live by fishing:

x x x x x x

## APPENDIX 10.

EXTRACT from MS Collection of Admiralty Decisions.  
(Vol.A. p. 411. General Register House.)

X X X X X X X

The Law of Nations is a Law of Consuetude. The practice then, on which neither party has chosen to give me any aid, is and must be a decision of the law. Now I find that it has been the practice of Courts of Admiralty everywhere to pronounce sentences of condemnation on vessels lying extra territorium provided the Court Exerce its jurisdiction sitting within the proper territory of the Belligerent Country by a native of which, or a person in the service of which, the prize was taken.... (As to the production of the ships papers being sufficient to found jurisdiction) I do not say that the practice has been frequent - it has, however, been done by the English Court of Admiralty sitting in London....' (Sir William Scott's opinion in the English precedent appears to have been quoted at this point from "Robertson's (sic) Reports Vol.2 at page 209 (The Christopher 2 C. Rob. 209).

For the same reasons more ably stated by that upright and learned judge I am clear for repelling.....  
(Date 7th August, 1801)

---

Appendix 11. (1)

Commission of the Judge of Admiralty to John Adair.

AT EDINBURGH the twenty sixth day of July j<sup>m</sup>vij<sup>c</sup> and six years the Commission underwritten was presented and ordered to be recorded off the which Commission the tenor follows. By the Judge of the High Court of Admiralty of the Kingdome of Scotland. THESE are Granting Warrant and Commission to John Adair, Geographer, for the said Kingdom of Scotland to Seize upon and bring in All Ships belonging to Forreigners that are found fishing within any Lochs, Creeks, Bayes or Rivers of this Kingdome or within sight of the Shoar and to secure the samen Ships, ane or mae, in safe harbours And thereafter transmit ane accompt thereof to the high Court of ADMIRALTY that their case may be Tryed and Determined Conforme to Law. Given under my hand and seal of the office of Admiralty At Edinburgh this Twentie sixth day of July One thousand seven hundred and six years. Sic subscribitur

JAMES GRAHAM

(L.S.)

## APPENDIX 11 (2)

Copy of letter supplied by Mr Harry R.G. Inglis, F.S.A.,  
F.R.G.S., The original in the General Register House could not  
be located when this essay was being written.

-----

Edinburgh 2nd June 1713.

My Lord

I had the honour of yours, and as your Lordship requires, an account of the Surveys, I have made or drawn out of the Coast and Islands of Scotland (which are not printed) is sent. The Surveys of the South and West Coasts, and the Frith of Clyde, are in the greatest forwardness, and so will require the least time, and expense to finish them. They are very necessary for carrying on trade, and with the description will make a complete part or volume, which in my humble opinion, will please better and be of greater use, than should publishing separate Maps.

My Lord there is a considerable sum of disbursed money resting as will appear by precepts of privy council, and Thesaurry and stented accounts. And I never had one farthing for pains, which shd Gsarahment (? the Government) did truly consider and designed a full recompence as appears by thir Act the 26th August 1704. But the English and Irish Ships, after the Union not paying the duty then imposed all was frustrated: However if the government shal think fit to appoint a fund to finish the part above proposed I shall let all my claims stand til that be done.

And as to the Survey of the West and North West Islands of Orkney and Zetland which will require the constant attendance of a good vessel or pinnace, if those be furnished by the government: and a suitable number of seamen to manadge them my purpose(d) expence will not be great.

My Lord, I have never doubted of the subscription for the Survey of Clackmannanshire, and country about Stirling, but having gone to East Lothian about the end of march to finish some work I had in hand there the weather in April proved so cold that soon after I was attacked in my right arme and hand by a rheumatick pain, that not only hindered my being west long agoe, but also this volume which in all duty should have been made sooner, I am now much better, so shall set about the work with all diligence and do my best to recover any time that is lost.

I hope your Lordship will pardon this from  
my Lord

Your Lordships  
most humble and  
most obedient servant  
John Adair.



(Handbook of Commercial Treaties (1931) p. 644)

EXTRACTS from the Treaty of Peace and Commerce between the United Kingdom and Sweden - Signed at Upsal, April 11, 1654.

Art. 3. The said Protector and Commonwealth, and the said Queen and Kingdom, shall take diligent care, that, as much as in them lies, all impediments and obstacles be removed, which have hitherto interrupted the freedom of navigation, and commerce as well between both nations, as with other people and countries within the dominions, lands, seas, and rivers of either, and shall sincerely endeavour to assert, maintain, defend, and promote the aforesaid liberty of navigation and commerce, against all the disturbers thereof, by such ways and means as either in this present treaty or hereafter shall be agreed upon; neither shall they suffer, that either by themselves, their subjects and people, or through their default, anything be done or committed contrary hereunto.

Art. 5. No merchants, captains, and masters of ships, marines, nor any persons, ships, goods or merchandise, belonging to either confederate, shall.... within any of the lands, havens, searoads, coasts, or dominions of the other, for any public service or expedition of war, or any other cause... be seized, embarked, arrested, forced by violence or be any way molested or injured: Provided only such arrests, as are conformable to justice and equity, be not hereby prohibited, so be it they are made according to the ordinary course of law, and are not granted upon private affection or partiality, but are requisite for the administration of right and justice.

Art. 6. (After stating that vessels forced to seek refuge in the harbours and roads of the other were to be received hospitably and allowed to depart without payment of customs or duties, the article continues) Provided they do nothing contrary to the laws, ordinances, and customs of the place, which the said ships shall enter into or abide in.

Art. 9. The said confederates, and all and singular their people and subjects... may safely and freely put in with their ships, and arrive at each other's ports, havens, and shores, and there stay, and thence depart, they carrying themselves peaceably and in conformity to the laws and customs of the respective places, and not disturbing the freedom of commerce therein. In like manner, the ships of war shall have free access to the ports of either, there to stay, and come to anchor; but not in such numbers as shall occasion manifest suspicion, without the leave and consent of that confederate first obtained to whom the port belongs, unless compelled there to by tempest, force or danger of the sea, in which case they shall signify to the Governor or chief magistrate of the place, the cause of their arrival, and shall continue there no longer than the said Governor or chief magistrate shall permit. Observing/

Observing always and everywhere the laws aforesaid, and such as shall hereafter be agreed upon.

Art. 15. It being the primary intent of this league and amity that each confederate, their people and subjects, might enjoy such freedom of navigation and commerce, as is described in the foregoing articles, within the Baltic, Sound, Northern, Western, and British Seas, Mediterranean, and Channel, and other the seas in Europe; therefore all sincere endeavour shall be used on both sides by common advice, aid, and assistance, ~~that~~ that the aforesaid mutual liberty of navigation and commerce be established, promoted, and, as occasion is, defended, against all the disturbers thereof, who shall go about to interrupt, prohibit, hinder, or restrain and limit the same to their own will and pleasure, in prejudice of the said confederates. And either part shall, with all willingness or readiness, promote the good and prevent the hurt of the other; saving the treaties which either nation hath made with other kingdoms, commonwealths and nations.....

Art. 16. For what concerns other commodities, which ships of war may enjoy, and the laws by which they shall regulate themselves when they arrive in each other's ports and harbours; and what concerns commerce to be exercised in America, as also the advantages of the herring and other fisheries, the erecting staples for trade, and other things and conditions, which shall be found requisite for the better clearing of the foregoing articles, resolution shall be had therein according to what shall be agreed upon in a distinct and peculiar treaty or contract.

---

### Appendix 13.

(Handbook of Commercial Treaties. p. 146)

EXTRACTS from treaty of Peace and Commerce between the United Kingdom and Denmark - Signed at Whitehall, February 13, 1660-1

their/ Art. 6. It shall be free for the subjects of both Kings to come with/merchandise, as well by land as by sea, into the kingdoms, provinces, mart-towns, ports and rivers of the other, ..... paying the usual customs and duties, saving always the sovereignty and right of either King, in their kingdoms, provinces, principalities, and territories respectively.

Art. 14. (Vessels were to be received if forced into harbour for refuge but were prohibited from entering into trade and from doing) anything repugnant to the laws, statutes, or customs of that place and port where they shall arrive.

Art. 20. It is covenanted and agreed that the subjects and people of either party shall always have free access to the ports and coasts of the other confederate; and it shall be lawful for them to abide there, and thence to depart again, and /t shall be lawful for them

and also to pass through the seas and territories of either King respectively, (doing no damage or prejudice), not only with merchant ships, but also with men-of-war... so as they exceed not the number of six men-of-war, if they come in of their own accord, nor stay longer in or about the ports than will be required to repair their ships, and furnish themselves, with victuals or other necessaries; and if upon occasion they would approach such coasts with a greater number of men-of-war, they shall by no means be permitted to enter, unless timely notice of their coming be first given by letter, and leave obtained of those to whom the foresaid ports belong; but if they be driven by violence of storm, or other urgent necessity to seek shelter, in such case, without notice given beforehand, the ships shall not be restrained to a certain number, but with this condition, that their commander shall, immediately upon their arrival, acquaint the chief magistrate or governor of that place, port or coast where they arrive, with the cause of their coming, neither shall he stay longer there than the chief magistrate or governor/permit, and shall neither do nor attempt any hostile act in the ports whereinto he shall repair, nor anything prejudicial to that ally unto whom the ports belong. Art. 22. (Provides for the payment of the Sound Dues.)

---

Appendix 14

(Handbook of Commercial Treaties p. 151.)

EXTRACT from Treaty of Peace and Commerce between the United Kingdom and Denmark - Signed at Copenhagen, July 11, 1670.

Art. 5. It shall be lawful for the subjects of both Kings, with their commodities and merchandise, both by sea and land in time of peace, without licence or safeconduct, general or special, to come to the kingdoms, provinces, mart-towns, ports and rivers of each other, and in any place therein to remain and trade, paying the usual customs and duties; reserving nevertheless to either prince his superiority and regal jurisdiction in his kingdom, provinces, principalities, and territories, respectively.

Art. 10. The subjects of either Crown trading upon the seas, and sailing by the coasts of either kingdom, shall not be obliged to come into any port, if their course were not directed thither; but shall have liberty to pursue their voyage without hindrance or detention withersoever they please.....



## Appendix 15.

(Handbook of Commercial Treaties. p. 652)

EXTRACT from Treaty of Commerce between the United Kingdom and Sweden. Done at Westminster, July 17, 1656.

Art. 10. It shall be free for the subjects of the most serene King of Sweden to fish and catch herrings and other fish in the seas and on the coasts which are in the dominion of this republic provided the ships employed in the fishery do not exceed 1,000 in number; nor while they are fishing shall they be anyways hindered or molested, nor shall any charges be demanded on the account of the fishing by the men of war of this republic, nor by those who are commissioned privately to trade at their own expense, nor by the fishing vessels on the northern coasts of Britain, but all persons shall be treated courteously and amicably, and shall be allowed even to dry their nets on the shore, and to purchase all necessary provisions from the inhabitants of those places at a fair price.

(Note - Sweden declined to adhere to the North Sea Convention)

## Appendix 16.

(Handbook of Commercial Treaties. p. 173)

Exchange of notes between the United Kingdom and Denmark respecting the Treatment of British Subjects, Companies and Vessels in Eastern Greenland.

No. 2.

Danish Minister for Foreign Affairs to Earl Granville.  
(Translation)

Copenhagen. June 4, 1925.

My Lord,

In reply to the note which you were good enough to address to me on the 23rd April last, I have the honour to inform you that the Royal Government will accord to British subjects, companies and vessels in East Greenland most favoured nation treatment in every respect and particularly as regards access to the coast and to the adjoining territorial waters, as regards hunting and fishing, as regards the right of occupying sites in virtue of usage, as regards the right of establishing meteorological, telegraphic or telephonic stations, and as regards the right of constructing installations for scientific and humanitarian purposes.....



## Appendix 17.

(Handbook of Commercial Treaties p. 698)

EXTRACT from the Convention of Commerce between the United Kingdom and the United States. - Signed at London, July 3, 1815.

Art. 1. There shall be between all the territories of His Britannic Majesty in Europe, and the territories of the United States, a reciprocal liberty of commerce. The inhabitants of the two countries respectively shall have liberty freely and securely to come with their ships and cargoes to all such places, ports and rivers in the territories aforesaid, to which other foreigners are permitted to come, to enter into the same, and to remain and reside in any part of the said territories respectively..... but always subject to the laws and statutes of the two countries respectively.

---

 Appendix 18.

(Handbook of Commercial Treaties. p. 702)

EXTRACT from Convention between the United Kingdom and the United States. - Signed at London, October, 20, 1818.

Art. 1. Whereas differences have arisen respecting the liberty claimed by the United States, for the inhabitants thereof to take, dry, and cure fish, on certain coasts, bays, harbours and creeks of His Britannic Majesty's dominions in America, it is agreed between the high contracting parties that the inhabitants of the said United States shall have, for ever, in common with the subjects of His Britannic Majesty, the liberty to take fish of every kind, on that part of the southern coast of Newfoundland, which extends from Cape Ray to the Rameau Islands, on the western and northern coast of Newfoundland, from the said Cape Ray to the Quirpon Islands, on the shores of the Magdalen Islands, and also on the coasts, bays, harbours and creeks from Mount Joy, on the southern coast of Labrador, to and through the Straits of Belle Isle, and thence northwardly indefinitely along the coast, without prejudice, however, to any of the exclusive rights of the Hudson's Bay Company. And that the American fishermen shall also have liberty, for ever, to dry ~~th~~ and cure fish in any of the unsettled bays, harbours, and creeks of the southern part of the coast of Newfoundland, here above described, and of the coast of Labrador; but so soon as the same or any portion thereof, shall be settled, it shall not be lawful for the said fishermen to dry or cure fish at such portion so settled, without the previous agreement for such purpose, with the inhabitants, proprietors, or possessors of the ground. And the United States hereby renounce, for ever, any liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish, on or/

or within three marine miles of any of the coasts, bays, creeks, or harbours of His Britannic Majesty's dominions in America not included within the above/mentioned limits.....

#### Appendix 19.

(Handbook of Commercial Treaties. p. 706.)

EXTRACT from Treaty between United Kingdom and the United States  
Signed at Washington, May 8, 1871.

Art. 6. In deciding the matter submitted to the arbitrators they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case. and by such principles of international law not inconsistent therewith as the arbitrators shall determine to have been applicable to the case:-

#### Rules;

A neutral Government is bound:-

First. To use diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.  
Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.  
Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.

Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article 1 arose, but that her majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these rules.

And/

And the high contracting parties agree to observe these rules as between themselves in future, and to bring them to the knowledge of other maritime Powers and to invite them to accede to them.

---

Appendix 20.

(Handbook of Commercial Treaties p. 831.)

Extracts from Treaty Regulating the Status of Spitzbergen and conferring the Sovereignty on Norway. Signed at Paris February 9, 1920.

(Parties :-

United States, Great Britain, Denmark, France, Italy, Japan, Norway, Holland, and Sweden.)

Art.1. The high contracting parties undertake to recognise, subject to the stipulations of the present treaty, the full and absolute sovereignty of Norway over the Archipelago of Spitzbergen,.....

Art.2. Ships and nationals of all the high contracting parties shall enjoy equally the rights of fishing and hunting in the territories specified in article 1 and in their territorial waters.

x                      x                      x                      x                      x

Art.3. The nationals of all the high contracting parties shall have equal liberty of access and entry for any reason or object whatever to the waters, fiords and ports of the territories specified in Article 1; subject to the observance of the local laws and regulations, .....

---

## Appendix 21.

(Handbook of Commercial Treaties. p.618)

EXTRACT from Temporary Commercial Agreement between the United Kingdom and the Union of Soviet Republics. Signed at London April 16, 1930.

Art. 3. (After conferring the right of most favoured nation treatment upon vessels their cargoes and passengers )-

Noted. - Nothing in this article shall be deemed to confer on the vessels of either party the right to carry on fishing operations in the territorial waters of the other, or to land their catches in the ports of the other, nor shall it entitle British vessels to claim any privileges which are, or may be, accorded by the Union of Soviet Republics to the fishing fleets of countries situated on the Arctic Ocean.

Social-  
ist

---

Appendix 22.

EXTRACT from Convention between Great Britain and Finland. Signed at London, October 13, 1933. (1932-33 Cmd. 4436)

Art. 1.

(1) The High Contracting Parties declare that it is their firm intention to uphold the principle -

(a) that the three miles extending from the coastline outwards and measured from low water mark constitute the proper limits of territorial waters; and

(b) That, in the absence of an agreement between them to this effect, neither of them can exercise jurisdiction over the vessels of the other outside the limits of territorial waters, except in the course of a hot and continuous pursuit of a vessel duly and lawfully commenced within the territorial waters and continued into the open sea.



Copy.Reference No.  
N.5137/21/30Foreign Office  
S.W.1.  
17th November, 1938.

Sir,

With reference to your letter of the 14th October last requesting information regarding the limit of territorial waters claimed by Norway, I am directed by Viscount Halifax to state that this limit is defined in the decree issued by the Norwegian Government on the 12th July, 1935, and to transmit to you herewith translations of that decree, of the explanatory statement issued therewith, of the report of the Committee of the Storting recommending the issue of the decree, and of the speech on this subject delivered in the Storting on the 24th June, 1935, by the Norwegian Minister for Foreign Affairs.

2. As regards the attitude of His Majesty's Government towards this decree, I am to inform you that, in so far as the decree and previous decrees of the Norwegian Government differ from the views of His Majesty's Government concerning the correct limits and methods of establishing territorial waters, as expressed in the answers returned by His Majesty's Government to the questionnaire circulated for the purposes of the Codification Conference at the Hague in 1930, His Majesty's Government have not agreed to these decrees which, inter alia, lay down revolutionary principle for establishing the base lines from which territorial waters are to be drawn; and although certain questions affecting fisheries in the neighbourhood of Norway are now under discussion with the Norwegian Government, the decrees, as such, are not in question in these discussions, the Norwegian Government having been made aware that His Majesty's Government cannot regard certain parts of them as being in conformity with international law.

I am,

Sir,

Your obedient Servant,  
Laurence Collier.Dr. W.M. Newlands,  
79 Hillview Road,  
Corstorphine,  
Edinburgh.

Annex (a) /

## Annex (a)

(Translation)

Royal Decree of July 12, 1935.

On the basis of ancient well-established national titles of right;

By reason of the geographical conditions prevailing on the Norwegian coasts;

In safeguard of the vital interests of the inhabitants of northernmost parts of the country;

And in accordance with the Royal decrees of the 22nd February, 1812, the 16th October, 1869, the 5th January, 1881, and the 9th September, 1889,

Are hereby established lines of delimitation towards the high sea of the Norwegian fisheries zone as regards that part of Norway which is situated northward of  $66^{\circ}28.8'$  north latitude.

These lines of delimitation shall run parallel with straight base-lines drawn between fixed points on the mainland, on islands or rocks, starting from the final point of the boundary line of the realm in the easternmost part of Varangerfjorden and going as far as Træna in the county of Nordland.

The fixed points between which the base lines shall be drawn are indicated in detail in a schedule annexed to this decree.

Schedule annexed to the Royal Decree of July 12, 1935.

1. The final point of the boundary line of the realm, as laid down in the "Additional Protocol to the Protocol on the Demarcation of the Frontier between Norway and Finland of 1925"

2. The most easterly, outermost point on Kibergneset, situated in  $70^{\circ}17.3'$  N. lat. and  $31^{\circ}4.3'$  E. long. Greenwich.

3. The outermost point on the eastern side of Hornøy, situated in  $70^{\circ}23.3'$  N. lat. and  $31^{\circ}10.5'$  E. long.

4. Staurneset on Hornøy, situated in  $70^{\circ}23.4'$  N. lat. and  $31^{\circ}10.2'$  E. long.

5. Kålneset on Reinøy, situated in  $70^{\circ}23.9'$  N. lat. and  $31^{\circ}9.3'$  E. long.

6. Korsneset, situated in  $70^{\circ}40.5'$  N. lat. and  $30^{\circ}13.4'$  E. long.

7. Molvikskjeret, situated in  $70^{\circ}42.3'$  N. lat. and  $30^{\circ}6.3'$  E. long.

8. Kjølneset, situated in  $70^{\circ}51.2'$  N. lat. and  $29^{\circ}14.8'$  E. long.

9. The rock with an iron pillar, eastward of the one on which Torrbåane beacon stands, situated in  $71^{\circ}6'$  N. lat. and  $28^{\circ}12.3'$  E. long.

10. The rock outside the one on which Torrbåane beacon stands, situated in  $71^{\circ}6.1'$  N. lat. and  $28^{\circ}11'$  E. long.

11./

11. The outermost point on Avløyssa near Nordkyn, situated in  $71^{\circ}08' \text{ N. lat.}$  and  $27^{\circ}39.9' \text{ E. long.}$
12. Knivskjerodden, situated in  $71^{\circ}11.1' \text{ N. lat.}$  and  $25^{\circ}40.9' \text{ E. long.}$
13. Avløyssinga near the north-western point of Hjelmsøy, situated in  $71^{\circ}06.9' \text{ N. lat.}$  and  $24^{\circ}43.7' \text{ E. long.}$
14. Stabben, the rock with an iron pillar northward of Ingøy, situated in  $71^{\circ}06.1' \text{ N. lat.}$  and  $24^{\circ}04.1' \text{ E. long.}$
15. The northernmost Skagholmen, situated in  $71^{\circ}05.8' \text{ N. lat.}$  and  $23^{\circ}59' \text{ E. long.}$
16. The dry rock situated in  $71^{\circ}05.8' \text{ N. lat.}$  and  $23^{\circ}58.8' \text{ E. long.}$
17. The dry rock situated in  $71^{\circ}05.7' \text{ N. lat.}$  and  $23^{\circ}58.6' \text{ E. long.}$
18. The westernmost Skagholmen, situated in  $71^{\circ}05.7' \text{ N. lat.}$  and  $23^{\circ}58.4' \text{ E. long.}$
19. Rundskjeret (Bondøyskjeret), situated in  $70^{\circ}51.5' \text{ N. lat.}$  and  $22^{\circ}48.7' \text{ E. long.}$
20. Darupskjeret, near the north-western point of Sorøy (Fuglen), situated in  $70^{\circ}40.5' \text{ N. lat.}$  and  $21^{\circ}59.1' \text{ E. long.}$
21. Vesterfallet in Gåsan, situated in  $70^{\circ}25.2' \text{ N. lat.}$  and  $19^{\circ}54.9' \text{ E. long.}$
22. Sannifallet, situated in  $70^{\circ}18.3' \text{ N. lat.}$  and  $19^{\circ}05.3' \text{ E. long.}$
23. Outer Fiskebåen, situated in  $70^{\circ}12.8' \text{ N. lat.}$  and  $18^{\circ}38.1' \text{ E. long.}$
24. Jubåen, situated in  $70^{\circ}06.2' \text{ N. lat.}$  and  $18^{\circ}23.6' \text{ E. long.}$
25. Saltbåen, situated in  $69^{\circ}52.8' \text{ N. lat.}$  and  $17^{\circ}56.4' \text{ E. long.}$
26. The north-western point of Kjølva, situated in  $69^{\circ}36' \text{ N. lat.}$  and  $17^{\circ}29.4' \text{ E. long.}$
27. Tokkebåen, situated in  $69^{\circ}29.5' \text{ N. lat.}$  and  $16^{\circ}57.3' \text{ E. long.}$
28. The dry rock NN.E. of Glimmen, situated in  $69^{\circ}21.4' \text{ N. lat.}$  and  $16^{\circ}11.4' \text{ E. long.}$
29. The northernmost of Svebåen, situated in  $69^{\circ}20.3' \text{ N. lat.}$  and  $16^{\circ}02.8' \text{ E. long.}$
30. The westernmost of Skreingan, situated in  $69^{\circ}15.6' \text{ N. lat.}$  and  $15^{\circ}48' \text{ E. long.}$
31. The northernmost of Flesan, northward of Langeneset, situated in  $69^{\circ}06.1' \text{ N. lat.}$  and  $15^{\circ}10.1' \text{ E. long.}$
32. The northern point of Flesa in Floholman, outside Skogsdøy, situated in  $68^{\circ}53.4' \text{ N. lat.}$  and  $14^{\circ}41.1' \text{ E. long.}$
33. The northern point of the northernmost of Floholman, outside Asanfjorden, situated in  $68^{\circ}44.7' \text{ N. lat.}$  and  $14^{\circ}19.5' \text{ E. long.}$
34. Utflesskjeret, situated in  $68^{\circ}39.4' \text{ N. lat.}$  and  $14^{\circ}13.3' \text{ E. long.}$
35. Kverna, situated in  $68^{\circ}19.5' \text{ N. lat.}$  and  $13.41' \text{ E. long.}$
36. The northernmost dry rock near Skarvholman, situated in  $68^{\circ}11' \text{ N. lat.}$  and  $13^{\circ}09.9' \text{ E. long.}$
37. The western point of the westernmost Skarvholmen, situated in  $68^{\circ}10.8' \text{ N. lat.}$  and  $13^{\circ}09.3' \text{ E. long.}$
38. The western point of Strandflesa, situated in  $68^{\circ}08.7' \text{ N. lat.}$  and  $13^{\circ}04.2' \text{ E. long.}$
- 39./



- 39 Nordboen, situated in  $67^{\circ}56'$  N. lat. and  $12^{\circ}47'$  E. long.
40. Flesa, north-west of Væroy, situated in  $67^{\circ}42.2'$  N. lat. and  $12^{\circ}35.4'$  E. long.
41. Hombøen, northward of Skarvholman, near Rost, situated in  $67^{\circ}32.3'$  N. lat. and  $12^{\circ}1.5'$  E. long.
42. Torrboen, situated in  $67^{\circ}31.5'$  N. lat. and  $11^{\circ}59.1'$  E. long.
43. Northern Skjortbaken, situated in  $67^{\circ}29.1'$  N. lat. and  $11^{\circ}52.2'$  E. long.
44. Havboen, situated in  $67^{\circ}25.9'$  N. lat. and  $11^{\circ}49.8'$  E. long.
45. Flesjan, situated in  $67^{\circ}25.9'$  N. lat. and  $11^{\circ}49.8'$  E. long.
46. The western point of the westernmost Bremholmen, near Mykjen, situated in  $66^{\circ}46.3'$  N. lat. and  $12^{\circ}26.8'$  E. long.
47. The western point of the westernmost Froholmen, situated in  $66^{\circ}35.5'$  N. lat. and  $12^{\circ}2.3'$  E. long.
48. The western edge of Bovarden, situated in  $66^{\circ}28.8'$  N. lat. and  $11^{\circ}56.6'$  E. long.

#### Annex (b)

#### Report of the Committee on Foreign Affairs.

#### (Translation)

After consultation with the Minister for Foreign Affairs, the committee hereby beg leave to submit their report as to the laying down of base-lines on that part of the coast where, according to experience hitherto acquired, it is most urgent to establish the necessary protection against destruction by foreign trawlers of the stock of fish at the bottom of the sea, i.e., off the coast of Northern Norway.

It is on this part of our coast that all the seizures of trawlers have taken place during later years; it is in respect of this part of the coast that over and over again disputes have arisen with the masters of foreign trawlers as to where the Norwegian fisheries limit goes; and in particular the British Government have repeatedly requested that the exact limit of this part of the coast should be fixed so that it might be communicated to the trawler organisations.

The fact that it has taken such a long time to have this question settled in a satisfactory way is due to special historical and geographical reasons which are very much alive in the minds of the people.

Since time immemorial the Northern Sea, from the southern boundary of Hålogaland, has been claimed as a Norwegian sea, the exploration of which was reserved for Norwegian subjects, and when the neutrality limit, i.e., the limit within which the King undertook to protect foreign vessels, was fixed, during the/



the great European wars in the 18th century, to be one German mile, equal to 4 nautical miles, it was not the intention, and it did not follow from the wording of the ordinance, that it should in any way restrict the exclusive fishing rights of the inhabitants. It was the high seas fisheries which had made it possible to settle on the coast of Northern Norway; without these fisheries the country would neither have been inhabited nor cultivated. So old are these facts that even the ancient sagas mention rules and regulations as to the high seas fisheries - just as they mention rules for the right of property on shore.

The only foreigners who, until the invention of the trawl, in a modest measure fished off a part of the coast of Northern Norway - with the King's permission - were the Russians, and they obtained this privilege through treaties and had to pay dues for fishing outside a limit of 1 Finnmark mile (6 nautical miles) from shore. Other Powers were fully aware of this limit.

The first time when a foreign (French) fishing vessel showed itself in Lofoten was in 1868; it was caused to stop fishing by an inspection vessel, and in the exchange of notes which ensued from this incident France recognised the special geographical, historical and economic reasons which made it a condition of life for the inhabitants of Northern Norway to have an exclusive fishing right within the 4-mile limit which the Norwegian Government claimed.

Owing to the development of trawl fishing, the Norwegian long-line and net fishing was threatened - in the same way as, for instance, the Scottish inshore fishing - and by a law of 1908 all trawl fishing in Norwegian territorial waters was prohibited.

The special social forms of the fishing industry which have developed in Norway, the co-operation and the collective economic interests, which in a special degree have given our fisheries a character of economic democracy on a broad basis, could not be consistent with steam trawl fishing, which would necessarily require always bigger ships and more capital. For the fishermen of Northern Norway, who are the poorest of the Norwegian people, fishing by cheap means is a necessity, a form of fishing which gives everyone his chance and the greatest possible latitude for personal daring and able seamanship.

In the northernmost part of our country some 90 per cent of the people are economically dependent upon the fisheries. The industrialising of the fishing and, as a consequence, its monopolising by strong capitalist societies would be a social catastrophe. Furthermore, trawling in Norwegian territorial waters would mean the destruction of the home fisheries.

At an early date the Norwegians were aware of the fact that the use and the development of trawling would mean the destruction of the stock fish on the old fishing grounds unless effective protective measures were internationally adopted./

adopted. Not only does the trawl kill the young fish and destroy all possibility of a rational renewal of the stock, but it breaks up the bottom of the sea, changes the nature of the banks and destroys the spawning places, and may thus essentially alter the rules for the migration of the fish. As a consequence of these circumstances, the old North Sea fisheries are a thing of the past. The fisheries off the coast of Scotland are ruined; the trawlers go farther and farther, and whilst only twenty-five years ago it was still an exception to see a foreign trawler off the coast of Norway, there are now every year hundreds of English, German and French trawlers, and sometimes of other nationalities, especially in the counties of Troms and Finnmark.

They fish on the banks which lie outside, partly far outside, the 4-mile belt, which in the sixties of last century was adopted as constituting the limit in relation also to fisheries; but nevertheless in waters which have from time immemorial and by right of discovery and exploitation been considered as being exclusively Norwegian waters and reserved for the inhabitants, who are inseparably tied to, and who derive their only livelihood from, the fishing industry off the coast.

The people of Northern Norway, therefore, have not felt in any way satisfied with the 4-mile fisheries zone, however the base lines might be drawn. It is true that this latter question is of the utmost importance, and it is growing in magnitude every year. As a consequence of the improvement of the trawling and the development of the tonnage and the engine power of the trawlers, it is now possible to trawl in waters where only a few years ago it was considered impossible owing to the depth and the conditions of the bottom of the sea, and the demands for an effective inspection are therefore always growing. But, at the same time, it is clearly recognised that the 4-mile limit alone does not in the long run secure the existence of the inhabitants. Numerous and strong demands have therefore been raised in the fishing districts for a far more extensive protection. Thus the committee, the Storting and the Government have received most urgent demands from local authorities and from mass meetings of fishermen to the effect that a 10-mile fisheries zone be established, or a 12-mile limit, as claimed by Russia - or even a 40-mile belt, so that the coastal banks might be wholly protected. And in times when tens of thousands of fishermen are without any means of subsistence because it has been ascertained that the stock of fish is continually diminishing, and in times when the Storting is voting millions of kroner every year in aid of destitute fishermen in the most exposed districts in order to keep them from starving - in such times these demands cannot be disregarded by the responsible authorities, but must be seriously examined; it is necessary to discuss ways and means of regulating the high sea fisheries in such a manner/

manner<sup>as</sup> to secure not only the livelihood of the inhabitants, but also to protect the stock of fish and thus avoid a breakdown of the trawling industry itself.

In order to show the feeling of the fishing population on the whole on this point, a few lines may be quoted from one of the numerous letters received by the committee:-

"There are thousands of people who are connected with the fishing industry, and who, confiding in the continuance of this industry, have for generations built their homes on the coast and very often, so to speak, on bare stones in mountainous districts, where there is no other livelihood than fishing. The Government have helped building harbours and have given loans towards the building of fishing crafts, and also of dwelling-houses, in places where it has been possible for the fishermen to cultivate a stretch of soil so as to keep a cow or two. All this has been done confiding in the fishing as the principal means of subsistence. Today great masses of youths stand ready to take up the hard struggle of their fathers, and they hope that the sea will give them enough to pay off the debts on their small, but beloved, homes.

" I have often thought of this when sailing along the outer side of Senja, and also when passing the small islets and sounds outside Tromsø.

" I find that England ought to show her goodwill and take up negotiations with a view to securing the conditions of life for the thousands of families who cannot otherwise make their livelihood on the long coast from Vesterålen to the Finnish border."

Certain discussions have taken place in the International Council for the Exploration of the Sea; and there have also been discussions between Norwegian and British delegates. As a link in the work for the protection of the fishermen, and in order to avoid friction, a Norwegian - British agreement was concluded in 1934 providing for the settlement of claims in respect of damages to fishing gear by trawlers whether caused in territorial waters or not. However, it has been urged, especially by England, that in order to arrive at establishing international protective regulations, it is necessary to know exactly where Norway draws the limit between national and international fisheries waters.

This committee have thoroughly discussed the question of extending the width of the fisheries zone which has been maintained by Norway since 1869, but they have come to the conclusion that they cannot recommend a considerable extension of the fisheries limit outside Norway by a unilateral Norwegian proclamation, however justified such measure/



measure would seem to be in view of the vital necessities of the inhabitants of Northern Norway. Norway has fishing interests on foreign coasts, too, and any arbitrary extension of the exclusive rights of the coastal state may create international friction.

The committee, therefore, do not venture to recommend to the Government, in spite of the most insistent demands from the inhabitants of the districts concerned, to proclaim certain banks outside the 4-mile limit - especially Malangsgrunnen and Svendsgrunnen - as Norwegian territory. They will confine themselves to recommending that the question as to the appropriate means for the protection of the fisheries on these and other banks be discussed with the interested Powers.

With a feeling of resignation, due to the development which has taken place in the last seventy years and to the fact that Norway has no longer been able to uphold the privileges on the seas which correspond to the old rights and the vital interests of the inhabitants, the committee confine themselves to recommending to the Government that a limit in respect of fisheries be fixed in conformity with that pre-<sup>re-</sup>cognised by the Governor of Finnmark in 1908 and by the Commission on Territorial Waters of 1911 in their report, specifying by Royal decree, in the same way as in 1869, from which points on the coast the 4-mile limit is to be reckoned.

This fisheries limit shall be drawn 4 miles outside, and parallel to, straight lines drawn between the following points:-

X                      X                      X                      X                      X                      X

/ See schedule annexed to the Royal decree of the 12th  
July, 1935

The fact that the committee have used the term fisheries limit is due to practical reasons. One of the principal aims of fixing the limit is to avoid friction with foreign trawlers. To this end it will suffice to fix the limit in relation to fisheries. The width of the customs boundary of Norway is ten miles. The two States the inhabitants of which in particular go in for trawling, viz., Great Britain and Germany, both claim a 3-mile neutrality limit. And they have both, especially Great Britain, intimated that they consider this to be of vital interest. It seems, therefore, that the simplest and most practical way of arriving at a modus vivendi as regards the trawling question would be to consider these two questions independently of one another. The easiest form for an understanding - explicit or implicit - as to the fisheries question between Norway and the interested States is that each State should reserve its principal point of view as regards the neutrality limit, so that nothing in that respect should be forfeited and nothing prejudiced. In this connection it is of some interest to quote the note from the British Government to the Norwegian Government of the 28th October, 1916, in which a 3-mile limit was claimed in a prize court case:-

"At/



"At the same time His Majesty's Government have no desire that the rights exercised by them in the fourth mile during the war should prejudice the Norwegian Government in the efforts which the latter may contemplate making in the future to secure recognition of their claims in connection with fishery rights, by international agreement, and in the event of the prize court holding that the only limit which Norway is entitled to claim for the purposes connected with the rights of belligerency is the 3-mile limit, His Majesty's Government are prepared to undertake not to quote such a decision as invalidating any Norwegian claims in connection with fishery rights."

The committee are aware that the base lines which they draw in conformity with former proposals do not on every point coincide with the lines indicated on the chart of Eastern Finnmark which, in November 1924, at the request of the British Legation in Oslo, was sent to the British Charge d'Affairs by the Ministry of Foreign Affairs. But a reservation was made beforehand to the effect that such a chart, if handed over, should not later on be invoked as in any way prejudicing the point of view of either country, a reservation which was reiterated when the chart was sent. The difference is insignificant as regards the sea space, but experience has proved that the base lines should be fixed as proposed in 1908 and 1911. The committee have made the necessary rectifications in conformity with the later, corrected charts.

The committee are further aware that the base lines which they recommend on certain points are somewhat longer than the so-called "red lines" indicated on some British charts. These latter lines have never been recognised by Norway, and they have no authoritative title except inasmuch as the Norwegian Minister in London, in a note of the 30th November, 1933, promised that the Norwegian fishery inspection vessels would abide by these lines - which, however, were not directly mentioned in the note - until further notice: "This step has been taken pending the decision of the Storting in regard to a Bill establishing the base lines of the Norwegian territorial waters."

It is this decision which the Storting is now being invited to take. And it would not be right to conceal the fact that these "red lines" have called forth protests from the interested districts. They were drawn up (at the time of the discussions which took place in Oslo in 1924) in consequence of a British request, and constituted an attempt at showing the principle on which base lines should be drawn according to the Norwegian point of view, but without in any way binding the Norwegian authorities as regards the final fixing of the base lines.

This clearly results from the explicit understanding on which the discussions in 1924-25 took place from both sides, viz.

"The two Governments represented are not in any way bound by what the committees or their members might put forward or agree to during the discussion. Neither shall these discussions, nor even the fact that they take place, in any respect whatsoever prejudice the present Norwegian point of view as to the extent of the territorial waters of Norway or with regard to other/

other questions in connection with territoriality. This, of course, holds good as regards the British point of view."

In conformity herewith and with reference to the Government's proposition, the committee invite the Storting to adopt the following resolution:-

"The Storting gives its consent to the Government soliciting a Royal decree establishing base line points for the fixing of the fishery limit of Norway from Grense-Jacobselv as far as Traena in conformity with those indicated in the present report."

---

Annex (c)

Speech by M. Koht, Minister for Foreign Affairs, in the Storting, on June 24, 1935.

(Translation)

On behalf of the Government, I wish to say that we entirely agree with the report of the Committee on Foreign Affairs which is laid before us, and we accept it with pleasure. The question which is herewith settled by Norway has been the object of discussions for many years between the authorities in this country, and it is obvious that, in the course of these discussions, many proposals as to its solution have been made. The question has been discussed for such a long time because so many considerations had to be taken into account and the settlement of a great number of details might be conceived in various ways.

But the solution which we arrive at in this report, and which I dare take for granted that the Storting will agree to, is based on a public opinion which has asserted itself more and more strongly and which corresponds to our national traditions in these matters.

There was a time when the Norwegian kings reckoned themselves as sole masters of the whole Norse Sea and could forbid foreign nations to send their vessels thither. The international progress however, both legal and economic, has put an end to such claims, and no one in this country now dreams of closing the Norse Sea to foreign sailors and fishermen. We must, and we will, keep within the limits of international law; but within these limits we must, on the other hand, keep up our own rights as they are formed by history and natural conditions.

Even though international law has made the high seas free to all as regards traffic and exploitation, it has nevertheless always recognised the national domination of the fjords in the various countries - and Norway is the country of fjords par excellence, so much so that the Norwegian word "fjord" has become an international term. But owing to the peculiar shape of our country and its sea coast, a "fjord" is somewhat different from what is understood by this term in most other countries. A fjord, as we understand it, is not only an arm of the sea stretching into the country, but is also the space of sea between islands and rocks. This is best illustrated in the case of Vestfjorden, which only on the inner side is flanked by the mainland/

mainland, whereas on the outer side it is limited by a great number of islands, and, nevertheless, it has always been recognised as a Norwegian fjord belonging, without any doubt, to the Norwegian maritime belt. Similar geographical conditions prevail in numerous places along the Norwegian coast, and the sea between and around our islands must be as much ours as the islands themselves. The range of islands and rocks off our shores must decide how the limit of our maritime belt is to be drawn. This has been a firm principle during all the discussions of the question of our sea limit and it is quite natural and right that the report of the Committee on Foreign Affairs should maintain this principle.

Even so, it might in many cases be a difficult question to decide from which headlands, islands or rocks the base lines should be drawn. But considering the peculiar configuration of the Norwegian coast, the most practical and correct way is undoubtedly not to draw the lines in and out following all the hooks and corners of the coast, but to draw them in the main direction of the coast line as indicated by the shape of the country itself.

The fact that we reckon our sea limit to be 4 nautical miles, or 1 sea mile, outwards from these base lines, as we have done these last 200 years, is so obvious that I need not say many words on that subject. Here we stand on firm historical ground and are in company with our neighbours. There are countries which have a broader sea belt and others which have a narrower one; we make no claim that they should follow us. But for our part, we must maintain our limit; we do nobody wrong thereby and we have a right to expect that nobody will try to force us to accept their special limit.

All these geographical and historical considerations have a special importance as regards the coasts bordering the Arctic Ocean, i.e., the whole coast line from Vestfjorden to Varangerfjorden outside Lofoten, Vesterålen, Senja and Finnmark. In those parts it is the sea fisheries which, in all times, have given the livelihood of the people. As regards the whole of Finnmark, from Malangen and eastwards, we may even say that it was the fisheries which made the Norwegian settlement there, some 600 years ago, possible. Through hard work and in difficult circumstances the Norwegian fishermen have made their living in those northern parts and built up a civilisation the like of which is found nowhere in the same latitudes. I believe they deserve the thanks and the respect of all those who appreciate patient work for peaceful conquest of the land.

They get their living from the sea, and if foreign companies with considerable capital behind them could come and drive them away from their fishing places, the country would soon become a desert. Once they were masters of all the banks off the coast and they fished there in their small boats and sold the fish to merchants further south. Their income was not big, but they managed to live on little. Now foreign trawlers have come and dredge the bottom of the sea and make life even more difficult for them. It is no wonder that they are discontent, and it is the duty of the Norwegian Government to protect/



protect them- that ought to be obvious to everybody. we neither will, nor can, re-establish the old exclusive rights of these poor fishermen on the banks far out in the sea. But close to land we must try to protect them so that they <sup>may</sup> go on with their work in peace. We must secure for them a sea belt which will allow them to live as human beings. That is what will be done, as far as possible, in following the report of the committee and that is why I am pleased to accept it.

The committee has confined itself to recommend what was most urgent - to lay down the definite sea limits for the northern part of the country. The question was very acute in those parts, and neither we nor the foreign Governments concerned could possibly wish the question to be left open for another fishing season. For those northern parts a decision has to be taken now.

The committee has further confined itself to the most urgent object in view, i.e., to protect our fishermen. That is why it has only proposed to lay down the fisheries limits, leaving alone all other questions in connection with territorial waters. I believe this to be right too. This moderation gives strength. Thereby we have declared that we do not intend to interfere with old rights as regards the usual maritime passage in our fjords and sounds. We do not propose to take up questions which might lead to controversy. We confine ourselves to lay down in detail what is old national right and which at the same time is a condition of life for the people in an important part of our country. Here we are strong and on this point there should be no controversy.

---

#### Annex (d)

#### Explanatory Statement issued with the Royal Decree of July 12, 1935.

##### (Translation)

The question of the Norwegian maritime boundaries has for a long time been the object of discussion between the authorities of the country. A special Royal Commission was appointed in 1911 to make enquiries as to the sea boundaries in Finnmark, in 1912 as regards the counties of Troms and Nordland, in 1913 as regards Nord-Trøndelag and Sør-Trøndelag and part of Møre. A new commission was appointed in 1926 to submit proposals as to the maritime boundaries of the whole of Norway.

Certain principles as to how the sea boundaries should be reckoned and drawn have been maintained unaltered by the Norwegian authorities as far back as the 17th century, and more especially since 1745 it has been an accepted rule that the King was master of the sea as far as 1 geographical mile from outlying banks and rocks along the coast. This rule was laid down in a more precise form by a Royal decree of the/



the 22nd February, 1812, by which it was resolved that the boundaries of the Norwegian maritime belt should extend as far as 1 ordinary geographical mile from the outermost isles or rocks which are not submerged by the sea.

But definite boundary lines have been laid down only as regards the sea off Sunnmøre, by a Royal decree of the 16th October, 1869; outside Romsdal and Nordmøre by a Royal decree of the 9th September, 1889, and for Varangerfjorden by a Royal ordinance of the 5th January, 1881. The boundaries of the county of Møre and Romsdal were proclaimed as limits of the Norwegian fisheries zone, and the boundaries outside Varangerfjorden as limits for whaling. Whenever a limit outside the base lines was mentioned it was fixed at 1 geographical mile.

By a law of the 30th September, 1921, it was enacted that the limits for the Norwegian customs inspection should be 10 nautical miles reckoned from the outermost isles and rocks.

In view of all these special resolutions and regulations it is evident that the Norwegian authorities - in full conformity with international law - have made use of their sovereign rights on the sea off the shores in order to fix the maritime boundaries separately for various purposes.

The question of the limits of the Norwegian fisheries zone became acute in the beginning of the 20th century, when British, German and other vessels started fishing with trawls off the shores of Northern Norway. By a law of the 2nd June, 1906, fishing by foreigners was prohibited in Norwegian territorial waters, and by a law of the 13th May, 1908, all trawling was forbidden in the same waters. But the enforcing of these laws has met with many difficulties because the exact limits of the Norwegian maritime belt were not laid down, and many negotiations have, in particular, taken place with the British Government.

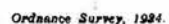
On the 17th June, 1935, the Committee of Foreign Affairs of the Storting presented a report to the effect that the Government should take steps to fix by a Royal decree the various points of the base lines from which the limits of the Norwegian fisheries zone shall be reckoned as regards the coast from Varangerfjorden to Traena in the county of Nordland. This report was based on proposals submitted by the Government in 1931 and 1934, and it was after consultations with the Foreign Minister now in office that the report confined itself to the said part of the coast and only dealt with the delimitation of the fisheries zone. The committee thus did not touch upon the question of the neutrality limit in times of war; it was understood that in case of war the King would make special regulations as regards this limit.

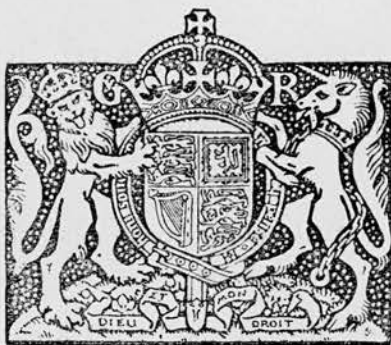
In/

In its report the committee - also after consultation with the Foreign Minister in office - had specified the points of the base lines to be fixed by the Royal decree.

The report was unanimously adopted by the Storting on the 24th June, 1935, and in the same sitting the Foreign Minister announced that the Government accepted it.

---





United States No. 1 (1924)

## Convention

between

the United Kingdom and the United States of America

respecting the

# Regulation of the Liquor Traffic

Washington, January 23, 1924

*Presented by the Secretary of State for Foreign Affairs  
to Parliament by Command of His Majesty*

LONDON

PRINTED AND PUBLISHED BY HIS MAJESTY'S STATIONERY OFFICE

To be purchased directly from H.M. STATIONERY OFFICE at the following addresses

Adastral House, Kingsway, London, W.C.2; 120, George Street, Edinburgh 2

York Street, Manchester; 1, St. Andrew's Crescent, Cardiff

15, Donegall Square West, Belfast

or through any Bookseller

1924

*Reprinted 1932*

Price 1d. Net

Cmd. 2063



CONVENTION BETWEEN THE UNITED KINGDOM AND THE  
UNITED STATES OF AMERICA RESPECTING THE REGULA-  
TION OF THE LIQUOR TRAFFIC.

---

*Washington, January 23, 1924.*

---

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India ;

And the President of the United States of America ;

Being desirous of avoiding any difficulties which might arise between them in connection with the laws in force in the United States on the subject of alcoholic beverages ;

Have decided to conclude a convention for that purpose ;

And have appointed as their Plenipotentiaries :

His Majesty the King of the United Kingdom of Great Britain and Ireland and of the British Dominions beyond the Seas, Emperor of India :

The Right Honourable Sir Auckland Campbell Geddes, G.C.M.G.,  
K.C.B., his Ambassador Extraordinary and Plenipotentiary to  
the United States of America ;

The President of the United States of America :

Charles Evans Hughes, Secretary of State of the United States ;

Who, having communicated their full powers found in good and due form, have agreed as follows :—

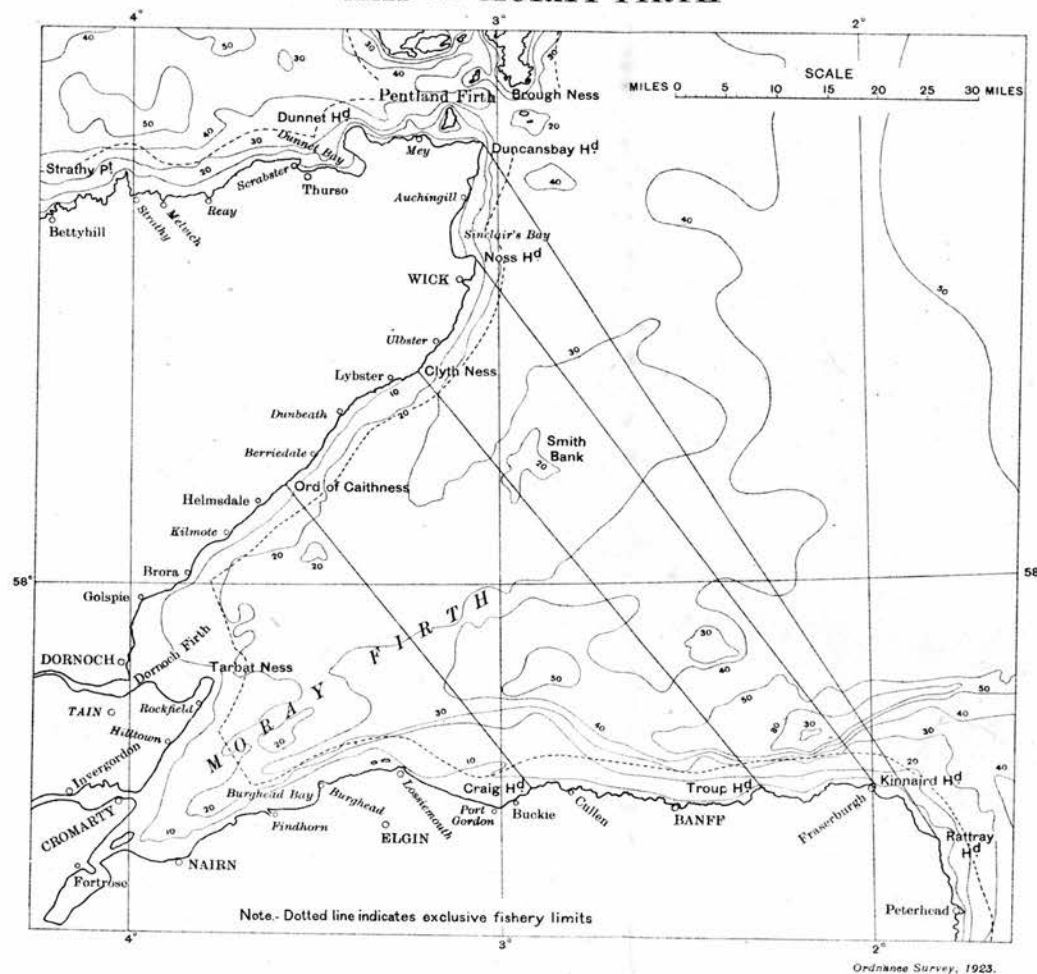
ARTICLE 1.

The High Contracting Parties declare that it is their firm intention to uphold the principle that three marine miles extending from the coastline outwards and measured from low-water mark constitute the proper limits of territorial waters.

ARTICLE 2.

(1) His Britannic Majesty agrees that he will raise no objection to the boarding of private vessels under the British flag outside the limits of territorial waters by the authorities of the United States, its territories or possessions in order that enquiries may be addressed to those on board and an examination be made of the ship's papers for the purpose of ascertaining whether the vessel or those on board are endeavouring to import or have imported alcoholic beverages

APPENDIX ~~25~~ 25(2)  
 MAP OF MORAY FIRTH



into the United States, its territories or possessions in violation of the laws there in force. When such enquiries and examination show a reasonable ground for suspicion, a search of the vessel may be instituted.

(2) If there is reasonable cause for belief that the vessel has committed or is committing or attempting to commit an offence against the laws of the United States, its territories or possessions prohibiting the importation of alcoholic beverages, the vessel may be seized and taken into a port of the United States, its territories or possessions for adjudication in accordance with such laws.

(3) The rights conferred by this article shall not be exercised at a greater distance from the coast of the United States, its territories or possessions than can be traversed in one hour by the vessel suspected of endeavouring to commit the offence. In cases, however, in which the liquor is intended to be conveyed to the United States, its territories or possessions, by a vessel other than the one boarded and searched, it shall be the speed of such other vessel and not the speed of the vessel boarded, which shall determine the distance from the coast at which the right under this article can be exercised.

#### ARTICLE 3.

No penalty or forfeiture under the laws of the United States shall be applicable or attach to alcoholic liquors or to vessels or persons by reason of the carriage of such liquors, when such liquors are listed as sea stores or cargo destined for a port foreign to the United States, its territories or possessions, on board British vessels voyaging to or from ports of the United States, or its territories or possessions, or passing through the territorial waters thereof, and such carriage shall be as now provided by law with respect to the transit of such liquors through the Panama Canal, provided that such liquors shall be kept under seal continuously while the vessel on which they are carried remains within said territorial waters and that no part of such liquors shall at any time or place be unladen within the United States, its territories or possessions.

#### ARTICLE 4.

Any claim by a British vessel for compensation on the grounds that it has suffered loss or injury through the improper or unreasonable exercise of the rights conferred by article 2 of this treaty or on the ground that it has not been given the benefit of article 3 shall be referred for the joint consideration of two persons, one of whom shall be nominated by each of the High Contracting Parties.

Effect shall be given to the recommendations contained in any such joint report. If no joint report can be agreed upon, the claim shall be referred to the Claims Commission established under the provisions of the Agreement for the Settlement of Outstanding Pecuniary Claims signed at Washington the 18th August, 1910, but



the claim shall not, before submission to the tribunal, require to be included in a schedule of claims confirmed in the manner therein provided.

#### ARTICLE 5.

This treaty shall be subject to ratification and shall remain in force for a period of one year from the date of the exchange of ratifications.

Three months before the expiration of the said period of one year, either of the High Contracting Parties may give notice of its desire to propose modifications in the terms of the treaty.

If such modifications have not been agreed upon before the expiration of the term of one year mentioned above, the treaty shall lapse.

If no notice is given on either side of the desire to propose modifications, the treaty shall remain in force for another year, and so on automatically, but subject always in respect of each such period of a year to the right on either side to propose as provided above three months before its expiration modifications in the treaty, and to the provision that if such modifications are not agreed upon before the close of the period of one year, the treaty shall lapse.

#### ARTICLE 6.

In the event that either of the High Contracting Parties shall be prevented either by judicial decision or legislative action from giving full effect to the provisions of the present treaty the said treaty shall automatically lapse, and, on such lapse or whenever this treaty shall cease to be in force, each High Contracting Party shall enjoy all the rights which it would have possessed had this treaty not been concluded.

The present convention shall be duly ratified by His Britannic Majesty and by the President of the United States of America, by and with the advice and consent of the Senate thereof; and the ratifications shall be exchanged at Washington as soon as possible.

In witness whereof the respective Plenipotentiaries have signed the present convention in duplicate, and have thereunto affixed their seals.

Done at the city of Washington, this twenty-third day of January, in the year of our Lord one thousand nine hundred and twenty-four.

(Seal) A. C. GEDDES.

(Seal) CHARLES EVANS HUGHES.



Treaty Series No. 22 (1930)

# TEMPORARY FISHERIES AGREEMENT

between the

GOVERNMENTS OF THE  
UNITED KINGDOM

and of the

UNION OF SOVIET SOCIALIST  
REPUBLICS

Signed at London on May 22, 1930

Presented by the Secretary of State for Foreign Affairs  
to Parliament by Command of His Majesty

LONDON:

PRINTED AND PUBLISHED BY HIS MAJESTY'S STATIONERY OFFICE

To be purchased directly from H.M. STATIONERY OFFICE at the following addresses:

Adastral House, Kingsway, London, W.C.2; 120, George Street, Edinburgh;

York Street, Manchester; 1, St. Andrew's Crescent, Cardiff;

15, Donegall Square West, Belfast;

or through any Bookseller.

1930

Price 1d. Net

Cmd. 3583

## Temporary Fisheries Agreement between the Governments of the United Kingdom and of the Union of Soviet Socialist Republics.

*Signed at London on May 22, 1930.*

THE Government of the United Kingdom of Great Britain and Northern Ireland and the Government of the Union of Soviet Socialist Republics, being mutually desirous to conclude as soon as possible a formal Convention for the regulation of the fisheries in waters contiguous to the Northern coasts of the territory of the Union of Soviet Socialist Republics, have meanwhile decided to conclude the following temporary Agreement to serve as a *modus vivendi* pending the conclusion of a formal Convention :—

### ARTICLE 1.

(1) The Government of the Union of Soviet Socialist Republics agree that fishing boats registered at the ports of the United Kingdom may fish at a distance of from 3 to 12 geographical miles from low water mark along the Northern coasts of the Union of Soviet Socialist Republics and the islands dependent thereon, and will permit such boats to navigate and anchor in all waters contiguous to the Northern coasts of the Union of Soviet Socialist Republics.

(2) As regards bays, the distance of 3 miles shall be measured from a straight line drawn across the bay in the part nearest the entrance, at the first point where the width does not exceed 10 miles.

(3) As regards the White Sea, fishing operations by fishing boats registered at the ports of the United Kingdom may be carried on to the north of Latitude 68° 10' North, outside a distance of 3 miles from the land.

(4) The waters to which this temporary Agreement applies shall be those lying between the meridians of 32° and 48° of East Longitude.

### ARTICLE 2.

Nothing in this temporary Agreement shall be deemed to prejudice the views held by either contracting Government as to the limits in international law of territorial waters.

### ARTICLE 3.

The present temporary Agreement comes into force on this day and shall remain in force until the conclusion and coming into force of a formal Convention for the regulation of the fisheries in waters contiguous to the Northern coasts of the territory of the Union of Soviet Socialist Republics, subject, however, to the right of either contracting Government at any time to give notice to the other to

terminate this Agreement, which shall then remain in force until the expiration of six months from the date on which such notice is given.

In witness whereof the undersigned have signed the present Agreement, and have affixed thereto their seals.

Done in duplicate at London, in the English language, the twenty-second day of May, One Thousand Nine Hundred and Thirty.

A translation shall be made into the Russian language as soon as possible and agreed upon between the Contracting Parties.

Both texts shall then be considered authentic for all purposes.

(L.S.)

ARTHUR HENDERSON.  
G. SOKOLNIKOFF.

*Protocol to Article 1 (1).*

The permission accorded by the Government of the Union of Soviet Socialist Republics in paragraph (1) of Article 1 of the present temporary Agreement to fishing boats registered at the ports of the United Kingdom to navigate and anchor in all waters contiguous to the Northern coasts of the Union of Soviet Socialist Republics shall not be deemed to entitle such fishing boats to navigate or anchor in inland waters or in other waters of the Union of Soviet Socialist Republics which are or may be closed to foreign vessels in general.

Done at London, the twenty-second day of May, One Thousand Nine Hundred and Thirty.

(L.S.)

ARTHUR HENDERSON.  
G. SOKOLNIKOFF.

*Protocol to Article 1 (4).*

The Government of the United Kingdom adhere to their view as to the right of fishing boats registered at the ports of the United Kingdom to fish in waters to which the present temporary Agreement does not apply and reserve the right to reopen the question of the limits specified in paragraph (4) of Article 1 of the present Agreement in the negotiations for the formal Convention referred to in the preamble to the present Agreement.

Done at London, the twenty-second day of May, One Thousand Nine Hundred and Thirty.

(L.S.)

ARTHUR HENDERSON.  
G. SOKOLNIKOFF.



## Appendix 28

EXTRACTS from the Statutes affecting fishing in the territorial waters of Scotland.

(1)

Herring Fishery Act, 1808. (48 Geo.III. c.110)  
Jurisdiction of sheriffs in Scotland extended.

Sect. 60. And whereas it may be useful to provide for preserving order and settling disputes among persons carrying on the fishery for herrings on the coast and in the lakes of Scotland; be it therefore enacted that the jurisdiction of the sheriffs and stewards depute of Scotland, and their substitutes, shall be extended over all persons engaged in catching, curing, and dealing in fish in all the lochs, bays, and arms of the sea within their respective counties and Stewarties, and also within ten miles of the coasts of their said counties and Stewarties, .....

(2)

Sea Fisheries Act, 1843. (6 & 7 Vic. c.79) (Schedule)

Art.II. The limits within which the general right of fishery is exclusively reserved to the subjects of the two Kingdoms respectively are fixed (with the exception of those in Granville Bay) at three miles distance from low water mark.

With respect to bays, the mouths of which do not exceed ten miles in width, the three mile distance is measured from a straight line drawn from headland to headland.

Art. III. The miles mentioned in the present Regulations are geographical miles of which sixty make a degree of latitude.

(3)

Herring Fisheries (Scotland) Act, 1867 ( 30 & 31 Vic. c.52)

Sect. 11. Unless there is anything in the context repugnant to such construction, the following words in this Act shall have the meanings hereby assigned to them:-

x                      x                      x                      x

The words "the Coasts of Scotland" shall mean and include all bays, estuaries, arms of the sea, and all tidal waters within the distance of three miles from the mainland or adjacent islands.

(4)/

(4)

The Sea Fisheries Act, 1868 (31 & 32 Vic. c.45) (First Schedule)

Convention between Her Majesty and the Emperor of the French relative to Fisheries in the Seas between Great Britain and France.

Her Majesty the Queen of the United Kingdom of Great Britain and Ireland, and His Majesty the Emperor of the French, having charged a Mixed Commission with preparing a revision of the Convention of the 2nd August, 1839, and of the Regulation of June 23, 1843, relative to the fisheries in the seas situated between Great Britain and France; and the members of that Commission having agreed upon certain arrangements which by experience has shown would be useful... their said Majesties have judged it expedient that the arrangement proposed by the said Commission should be sanctioned by a new Convention.....

Art. 1. British fishermen shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark, along the whole extent of the British islands; and French fishermen shall enjoy the exclusive right of fishery within three miles from low-water mark along the whole extent of the coast of France which lies between Cape Carteret and Point Meinga.

The distance of three miles fixed as the general limit for the exclusive right of fishery upon the coasts of the two countries shall, with respect to bays, the mouths of which do not exceed ten miles in width, be measured from a straight line drawn from headland to headland.

The miles mentioned in the present Convention are geographic miles, whereof sixty make a degree of latitude.

(This Art. is repealed provisionally by 46 & 47 Vic., c.22 sec. 30.)

(5)

The Sea Fisheries Act, 1883. (46&47 Vic., c.22)

Section 28. In this Act, -

X X X X X

The expression 'exclusive fishery limits of the British Islands' means that portion of the seas surrounding the British Islands within which Her Majesty's subjects have by international law, the exclusive right of fishing, and where such portion is defined by the terms of any convention, treaty, or arrangement for the time being in force between Her Majesty and any Foreign State, includes, as regards the sea-fishing boats and officers and subjects of that State, the portion so defined:

X X X X X

First/

First schedule.

X            X            X            X            X

Article I.

The provisions of the present Convention, the object of which is to regulate the police of the fisheries in the North Sea outside territorial waters, shall apply to the High Contracting Parties.

Art. II.

The fishermen of each country shall enjoy the exclusive right of fishery within the distance of three miles from low-water mark along the whole extent of the coasts of their respective countries, as well as of the dependant islands and banks.

As regards bays, the distance of three miles shall be measured from a straight line drawn across the bays, in the part nearest the entrance, at the first point where the width does not exceed ten miles.

The present Article shall not in any way prejudice the freedom of navigation and anchorage in territorial waters accorded to fishing boats, provided they conform to the special police regulations enacted by the Powers to whom the shore belongs.

Art. IV.

For the purpose of applying the provisions of the present Convention, the limits of the North Sea shall be fixed as follows:-

X            X            X            X            X            X            X

## 3. On the West:-

- (2) By the eastern coasts of England and Scotland:
- (3) By a straight line joining Duncansby Head (Scotland) and the southern point of South Ronaldsha (Orkney Islands):
- (4) By the eastern coasts of the Orkney Islands:
- (5) By a straight line joining North Ronaldsha Lighthouse (Orkney Islands and Sumburgh Head Lighthouse (Shetland Islands):
- (6) By the eastern shores of the Shetland Islands:
- (7) By the meridian of North Unst Lighthouse (Shetland Islands) as far as the parallel of the 61st degree of latitude.

(6)

Sea Fisheries Regulation (Scotland) Act, 1895.

Sec. 10(1) The Fishery Board may, by byelaw or byelaws, direct that the methods of fishing known as beam trawling or otter trawling shall not be used in any areas or areas under the jurisdiction of Her Majesty, within thirteen miles of the Scottish coast, to be defined in such byelaws for the purpose of this section.....

X            X            X            X            X  
(3)✓/



(3) Provided that no area of sea within the said limit of thirteen miles shall be deemed to be under the jurisdiction of Her Majesty for the purposes of this section unless the powers conferred thereby shall have been accepted as binding upon their own subjects with respect to such area by all the States signatories of the North Sea Convention, 1882.

(4) Any person who uses any such method of fishing in contravention of such byelaw, shall be liable on conviction, under the Summary Jurisdiction (Scotland) Acts, to a fine not exceeding one hundred pounds....

(7)

Byelaw (No.10) made by the Fishery Board for Scotland, under the powers conferred on the Board by the Sea Fisheries (Scotland) Amendment Act, 1885, the Herring Fishery (Scotland) Act, 1889, and the Herring Fishery (Scotland) Act Amendment Act, 1890.

Art. II.

Whereas by the Act 52 & 53 Vict. cap. 23, being the afore-Herring Fishery (Scotland) Act, 1889, it is enacted that the Fishery Board for Scotland may by byelaw or byelaws direct that the method of fishing known as beam trawling or otter trawling shall not be used within a line drawn from Duncansby Head, in Caithness, to Rattray Point, in Aberdeenshire, in any area or areas to be defined 'in such byelaw', it is hereby declared that the foregoing provision shall apply to the whole area above specified....

Art. III.

Within the aforesaid area, as above defined, no person, unless in the service or possessing the written authority of the said Fishery Board for Scotland, under the hand of the Secretary thereof, shall at any time from the date when this byelaw shall come into force use any beam trawl or otter trawl for taking sea fish.....

x      x      x      x      x      x      x



EXTRACT from Declaration and Memorandum between the United Kingdom, Denmark, France, Germany, the Netherlands, and Sweden concerning the Maintenance of the Status Quo in the territories bordering upon the North Sea. Berlin, April 23, 1908.

Animated by the desire to strengthen the ties of neighbourly friendship existing between their respective countries, and to contribute thereby to the preservation of universal peace, and recognising that their policy with respect to the regions bordering on the North Sea is directed to the maintenance of the existing territorial status quo.

Declare that they are firmly resolved to preserve intact, and mutually to respect, the sovereign rights which their countries at present enjoy over their respective territories in those regions.

Parl. Pp. (1908) Cd. 4248.

---

### Appendix 30.

Note of provisions of miscellaneous treaties subsisting between Britain and other States other than parties to the North Sea Convention of 1882 relating to the reservation of fisheries in territorial waters.

| Handbook<br>of<br>Commercial<br>Treaties. | State<br>and<br>Year. | Article<br>of<br>Treaty. | Provision.                                 |
|---|-----------------------|--------------------------|--|
| 188                                       | Esthonia<br>1926      | 15                       | Fisheries<br>reserved<br>for<br>nationals. |
| 390                                       | Japan<br>1911         | 2 5                      | do.  |
| 584                                       | Roumania<br>1930      | 24                       | do.  |
| 585                                       | Turkey<br>1930        | 25                       | do.  |

## B I B L I O G R A P H Y.

(The abbreviations used in the footnotes are underlined)

A. Unedited MSS and Records:

Records of the Admiralty Court of Scotland.  
(General Register House, Edinburgh.)

Admiralty Decisions

Collection of decisions by Mr Hodgson Cay, Judge Admiral  
in the High Court of Admiralty of Scotland Vol.s A -D.  
(General Register House, Edinburgh.)

Register of Commissions to Depute Admirals  
(1693-1717) (General Register House, Edinburgh.)

Commissariat of Edinburgh

Register of deeds of the Commissariat of Edinburgh.  
(General Register House, Edinburgh.)

Treaties and correspondence in General Register House,  
Edinburgh, relating to (a) Norway, Sweden and Denmark and  
(b) England France and the Netherlands.

Original papers and prints contained in portfolios relating  
to John Adair, Geographer Royal, and Captain Slezer.  
(General Register House, Edinburgh.)

B. MSS in Edinburgh University Library:

Sea Lawes of the Hanse Towns. 1597.

Maritime Lawes of Charles V. Roman Emperor, 1551  
No. 740.

C. MSS. in National Library, Edinburgh.

Admiralty Court Papers. 1751-1769 29:2:12.

Admiralitat Collectio 28:4:6. (Part of this is based  
with full acknowledgment upon Welwod's De Dominio Maris)

Decisions of the Lords of Council and Session. Reported  
by Sir John Lauder of Fountainhall at several periods.  
29:4:1; Fol. 11.

De Officio Admiralitatis Angliae 28:6:6.  
Mr/

Unedited MSS and Records (Contd.)

Mr Bedford's Book of ye Admiralty. Dedicated to Sir  
Leoline Jenkins.

Decisions of the Court of Admiralty from 5th June, 1673. 6:2:1

Grant of Right to the City of Bruges to fish on the Scottish  
shore, dated 29th September, 1666.  
25:3:4. S82. 113-115.

Tractatus legum et consuetudinum navalium  
Alexander King. 28:4:7.

D. Edited Primary Sources.

Scottish:

Scots Statutes. Acts of the Scottish Parliament.  
Edited by Thomson.

P.C.R.S. Records of the Privy Council of Scotland.

S.P. Calendar of State Papers relating to Scotland.

Acts of the Lords of Council

Acts of Sederunt (of Court of Session)  
Edinburgh 1740.

Reg, Mag. Sig. Registrum Magni Sigilli Regum Scotorum.

Exchequer Rolls of Scotland

English:

Rot. Parl. Rolls of ~~Parliament, and Statutes of the realm.~~

P.C.R.E. Records of the Privy Council of England.

S.P. Calendar of State papers.

Bruce Report of the Union. (John Bruce, London, 1799)

British /

Acts of Parliament. /

Hansard Report of Parliamentary Debates.

Parl. /

Edited Primary sources (Contd.)

Parl. Papers ) State Papers and papers presented to  
Cmd. ) Parliament.

Handbook of Commercial Treaties.  
 (Edition 1931)

Mackenzie Commission Report.

The Report of the Scottish Departmental Committee on  
 Trawling and Policing of Scottish Sea Fisheries.

Manual of the Defence of the Realm Act, (8th Edn.)

Return of the precise position in Foreign Law in regard to  
 the Restrictive Legislation affecting Sea Fisheries.  
 (1901)

United States:

United States Arbitration Series No. 2.

(The diplomatic correspondence and papers relating to the  
 arbitration on the sinking of the Titanic with the  
 interim and final awards.)

League of Nations:

League of Nations.

Report of the Conference for the Codification of  
 International Law held at the Hague, 1930.

Volume I. Report of the Plenary Meetings.  
 (C.35.M.145.1930.V.)

Volume II. Report of the Second Commission. (Territorial  
 Waters)  
 (C. 230. M. 117. 1930. V.)

Volume III. Minutes of the Second Commission.  
 (C. 351.(b). M. 145(b) 1930.V.)

(Records printed other than under the authority of the  
 Crown or other official authority are included in  
 the secondary sources.)



## E. Secondary and Miscellaneous Sources.

Acta Curiae Admirallatus Scotiae (1557 - 1561/2)  
Stair Society. Edinburgh.

Adair, John,

Description of the Sea Coasts and Islands of Scotland  
with large and exact maps for the use of seamen.

John Adair, Geographer for the Kingdom.  
Edinburgh, 1703.

Anderson, A.O. Early Sources of Scottish History.  
Edinburgh 1922.

Anderson (Commerce)

An Historical and Chronological Deduction of the Origin  
of Commerce from the earliest accounts to the present  
time.

London. 1764.

(This volume contains a reprint of Sir Philip Me(a)dow's  
Observations concerning the Dominion and Sovereignty  
of the Sea.)

Baker, Sir Sherston

The Office of Vice Admiral of the Coast.  
(Privately printed) London. 1884.

Balfour's Practicks.

Practicks or a system of the more ancient law of  
Scotland and compiled by Sir James Balfour of  
Pittendreich.

Edinburgh. 1754.

/ Bannatyne Miscellany

Volume II.

Edinburgh 1836.

Barclay - International Law.

International Law and practice.

Sir Thomas Barclay.

London. 1917.

/ Bell's Commentaries.

Commentaries on the Law of Scotland and on the  
Principles of Mercantile Jurisprudence.

George J. Bell.

(7th Edn. Edinburgh 1870.

/ Bell's Election Law.

A treatise on the Election Laws as they relate to  
the representation of Scotland in the Parliament

of/

of the United Kingdom and Ireland.  
 Robert Bell.  
 Edinburgh. 1812.

Bell's Principles

Principles of the Law of Scotland.  
 George J. Bell.  
 (10th Edn. Edinburgh. 1899.)

Birkenhead.

International Law.  
 Rt. Hon. The Earl of Birkenhead.  
 (6th Edn) London 1927.

Bisset, Habakkuk

Elements of Courtis. Edited by Hamilton Grierson.  
 Scottish Text Society. Edinburgh 1920-22.

Boroughs, Sir John

The Sovereignty of the British Seas.  
 Edited by T. Callandar Wade.  
 Edinburgh 1920.

Buchanan George

History of Scotland (English Trans.)  
 London 1690.

Butler and MacCoby

The Development of International Law.  
 (Contributions to International Law and Diplomacy)  
 London. 1928.

B.Y.I.L.

British Year Book of International Law.  
 (1920 -

Bynkershoek, De Dominio

De Dominion Maris Dissertatio  
 Cornelius van Bynkershoek.  
 Edn. of 1744 reprinted by Carnegie Endowment  
 for International Peace. New York. 1923.

Bynkershoek, Questionum

Questionum Juris Publici  
 Cornelius van Bynkershoek.  
 Edn. of 1737 reproduced by Carnegie Endow-  
 ment for International Peace. Oxford. 1930.

C.M.H. Cambridge Medieval History.  
 Cambridge. 1911-1926.

Camden/

Camden

Annals of Queen Elizabeth.  
1635 Edn. London.

Chalmers Caledonia.

Or an Account of North Britain from the most ancient  
times to the present times.

George Chalmers.  
London. 1858.

Cobbett

See Pitt Cobbett.

Craig. ThomasDe Unione Regnorum

Published by the Scottish Text Society.  
Edinburgh 1909

Jus Feudale

3rd Edn. Edinburgh 1732.

C.R.B.

Records of the Convention of Royal Burghs of Scotland.  
Edinburgh.

Davidson and Gray

The Scottish Staple at Veere.  
London. 1909.

De Louter

Le Droit International Public Positif.

Published by the Carnegie Endowment for International  
Peace. Oxford. 1920.

Dumont - See FoederaEarly Maps of Scotland.

Royal Scottish Geographical Society.  
Edinburgh. 1934.

Edinburgh Burgh Records.

Published by the Edinburgh Town Council.

Erskine Institutes

An Institute of the Law of Scotland.  
John Erskine. Edinburgh 1871.

Principles

Principles of the Law of Scotland.  
(20th Edn.) Edinburgh. 1903.

Fauchille./

Fauchille

traité de Droit International et Public.  
 Paul Fauchille.  
 (8th Edn.) Paris 1922-25.

Fenn

The Origin of the Right of Fishing in Territorial Waters. Percy T. Fenn.  
 Cambridge. 1926.

Fiore

International Law Codified and its Legal Sanctions.  
 Pasquale Fiore.  
 English trans. of 5th Italian Edn.  
 New York. 1918.

Fischer

The Scots in Germany. Th. A. Fischer.  
 Edinburgh. 1902.

Foedera - Dumont

Corps Universel Diplomatique du Droit des Gens.  
 J. Dumont. Antwerp.

Foedera ----- Foedera. Conventiones, Literae, etc.  
 Rymer. London 1727.

Fleming Arnold J.

Flemish Influence in Britain.  
 Glasgow. 1930.

Fulton Thomas W.

The Sovereignty of the Sea.  
 Edinburgh. 1911.

Garner

Prize Law during the World War.  
 James W. Garner.  
 New York. 1927.

Garner Inter. Law.

International Law and the World War.  
 James W. Garner. London. 1920.

Gentilis Alberico

Hispanicae Advocationis  
 Edn. of 1661 reproduced by Carnegie Endowment for  
 International Peace. New York. 1921.

Gibbon, Edward

The History of the Decline and fall of the Roman Empire. Edn. 1906. London.

Glötz.



- ✓ Glutz, Gustave  
Ancient Greece at Work.  
Trans. by M.R. Dobie. London, 1926.

- Grant, I. F.  
The Social and Economic Development of Scotland  
before 1603.  
Edinburgh 1930.

- Grotius, Hugo  
Mare Liberum sive de jure quod Batavis competit ad  
Indiana Commercia Dissertatio. 1608.  
Translation with a revision of the Latin text of  
1633. Published by the Carnegie Endowment for  
International Peace, Washington, 1916.  
✓ De Jure Belli ac Pacis Libri Duo.  
Text of 1646. Published by the Carnegie Institu-  
tion of Washington, 1913. Translation by Francis  
Kelset. Oxford Press for the Carnegie Endowment  
for International Peace. 1925.

- Hague Conference Reports.  
The Reports of the Hague conferences of 1899 and 1907.  
Edited by James B. Scott.  
(Published by the Carnegie Endowment for Internat-  
ional Peace.) Oxford. 1917.

- Hague Conventions.  
Les Conventions et Declarations de la Haye de  
1899 et 1907.  
(Published by the Carnegie Endowment for Inter-  
national Peace.) New York. 1918.

- Hague Court Reports.  
Les Travaux de la Cour Permanent d' arbitrage de la  
Haye.  
Recueil de ses sentences, etc.  
Edited by James B. Scott.  
(Published by the Carnegie Endowment for Inter-  
national Peace).  
New York. 1921.

- Hague Court Reports (2nd Series)  
The Hague Reports (Second Series)  
Edited by James B. Scott.  
(Published by the Carnegie Endowment for Inter-  
national Peace.) New York. 1932

- Hale  
A Treatise de jure maris et brachiorum eiusdem.  
Sir Matthew Hale.

Hall

A Treatise on International Law.

Wm. E. Hall. (8th Edn. by A Pearce Higgins.)  
Oxford. 1924.

7

Hautefeuille.

Histoire des origines, des progrès et des variations  
de droit maritime international.

L.B. Hautefeuille.  
Paris 1858.

Heyd

Histoire du Commerce du levant au moyen-âge.

W. Heyd. Trad. Furey Raynaud. Leipzig.  
1936.

Holdsworth

History of English Law.

3rd Edition. London. 1922.

Holland- Jurisprudence

Jurisprudence.

T. H. Holland. 12th Edition.  
Oxford. 1916.

Holland

Studies in International Law.

T. E. Holland. Oxford 1898.

Insh, G. Pratt

Scottish Colonial Schemes. 1620-1686.  
Glasgow, 1922.

Hyde

International Law chiefly as interpreted and applied  
by the United States.

Charles C. Hyde.  
Boston. 1922.

Institute of International Law

Resolutions of the Institute of International Law.

Collected and translated under the supervision of  
James B. Scott.

(Published by the Carnegie Endowment for International  
Peace).

New York. 1916.

International/

International Conciliation.

Published by the Carnegie Endowment for International Peace. New York.

International Law Review.

Revue de Droit international de Science diplomatique politique et sociales.

Geneva 1923.

Iona Club

Iona Club. Collectanea de rebus Albanicis.  
Edinburgh 1847.

Jessup

The Law of territorial Waters and Maritime Jurisdiction.

Philip C. Jessup.

New York. 1927.

Justice, Alexander

A general Treatise of the Dominion and Laws of the Sea. London. 1705.

Kent's Commentaries.

Commentaries on American Law. (11th Edition)

James Kent.

Boston. 1866.

Lapradelle

Les principes généraux du droit international.

A de Lapradelle.

(Published by the Carnegie Endowment for International Peace.)

Paris. 1932.

Larson

The Earliest Norwegian Laws being the Gulathing Law and the Frostathing Law. Trans. from the Old Norwegian by Lawrence M. Larson.

Columbia University Press. 1935.

Law Quarterly Review.Law Tracts/

Law Tracts

Report upon the Scots Judicature Bill, etc., by a  
Committee of the Faculty of Procurators Before the  
High Court of Admiralty (for Scotland).  
Edinburgh. 1824.

✓ Lawrence

The Principles of International Law.

T.J. Lawrence.

(7th Edition by P.H. Winfield) London, 1923

Lawrie, Sir Archibald C.

Early Scottish Charters prior to A.D. 1153.

Glasgow 1905.

Lorimer, James

The Institutes of the Laws of Nations.

Edinburgh 1883.

Maine, Sir Henry

Ancient Law.

Edition with Sir Frederick Pollock's notes.  
(Reprint of 1924)

Maitland, William

The History of Edinburgh.

Edinburgh . 1753.

✧ Marsden

Law and Customs of the Sea 1205- 1767.

Navy Records Society. 1916.

(De) Martens' Receuil

Nouveau recueil général de traites, etc.

Matsunami, N.

Immunity of State Ships - as a contribution to the  
unification of the laws on the subject.

London. 1924

✓ Mitchell, John M.

The Herring. Its natural history and national  
importance. Edinburgh 1864.

Moncrieff, Thomas

Memoirs concerning the Ancient Alliance between  
French and Scots' Edinburgh. 1751.

(Printed in Miscellanea Scotica. Vol. 4. pp.30-31.

Moore/



Moore Digest

A Digest of International Law.  
John Bassett Moore.  
Washington! 1906.

Moore International Adjudications.

International Adjudications (Modern Series).  
John Bassett Moore. New York. 1929-31.

Motley. John L.

History of the United Netherlands from the Death of  
William, the Silent, to the Twelve Years Truce.  
London. 1876.

Nicolay

The Navigation of James V round Scotland.  
(The French edition has a map which is the most valuable part of the book. Edinburgh University Library).

Nielsen Fred K.

Arbitration  
American and British Claims/under the Special  
Agreement of August, 18th, 1910.  
Washington. 1926.

Nys.

Le Droit International, Les principes, les théories,  
les faits.  
Ernest Nys. Bruxelles. 1904-6.

Nys - Etudes

Etudes des Droit International et de Droit politique.  
2me ser. 1901.

Oppenheim

International Law.  
L. Oppenheim  
(5th Edn. Ed. L. Lauterpacht) London 1935.

Orkney

Records of the Earldom of Orkney. 1299 -1614.  
Scottish History Society. Sec. Ser. No.7.  
Edinburgh 1914.

Ortolan

Regles Internationales et Diplomatie de la Mer.  
Theodore Ortolan. Paris 1864.

Pardessus, J. M.

Us et Coutumes de la mer. Paris 1847.

Phillimore/

Phillimore, Sir Robert J.

Commentaries on International Law.  
London 1879-89.

Phillipson, Coleman

The International Law and Custom of Ancient Greece  
and Rome. London 1911.

Pistoye MM. A de et Ch. Duverdy.

Traite de Prises Maritimes.  
Paris 1855

Pitt Cobbett

Leading cases on International Law.  
4th Edn. by H.L. Ballot.  
London 1922 and 1924.

Politis, Nicolas

La Neutralité et la paix  
Paris 1935.

Previté Orton, C.W.

Outlines of Medieval History.  
Cambridge. 1916.

Rankine, John.

A Treatise on the rights and burdens incident to the  
ownership of lands and other heritages in Scotland.  
3rd Edn. Edinburgh 1891.

Revue

Revue Generale du Droit, de la Legislation et de la  
Jurisprudence en France et a Etranger.  
Paris 1871 -

R.D.I.P.

Revue de Droit international et de legislation comparée  
1869 -

Reid Helen D.

International Servitudes in International Law.  
Chicago. 1932.

Rolin, Alberic.

Le Droit moderne de la guerre. Les principes, les  
conventions, les usages et les abus.  
Bruxelles. 1921.

Rooseboom M.P.

The Scottish Staple in the Netherlands.  
The Hague. 1910.

Samuel/

Samuel, Arthur M.

The Herring. Its effect on the History of Britain.  
London 1918.

Scots Navy.

The Old Scots navy from 1689 to 1710.  
Navy Records Society. 1912.

Scott.

Scottish Economic Literature to 1800. A list of  
authorities prepared for the Committee of the Scottish  
Exhibition of National History, Art, and Industry,  
Glasgow. 1911.

Scottish Geographical Magazine.

Vol. XXXII. Edinburgh 1918.

Sea Laws.

The Sea Lawis collectit furth of the actis of parla-  
ment, the practiques, the lawis of Oleron, and the  
lawis of Wisbie, and the constitutionis of Francois,  
King of France annis 1543-1557.

See Balfour's Practicks. pp. 614 et seq.

Select Pleas

Select Pleas of the Admiralty.

Selden Society Publications Vol. VI. 1892.

Selden. J.

Mare Clausum seu De Dominio Maris  
London 1635

Skene

Regiam Majestatem  
Edinburgh 1609.

Smith and Sibley

International Law as interpreted during the  
Russo Japanese War.

F.E. Smith and N.W. Sibley.  
London 1907.

Spottiswode

History of the Church of Scotland.  
London. 1645.

Stair

The Institutions of the Law of Scotland deduced from  
its originals and collated with the Civil, Canon and  
Feudal Laws and with the customs of neighbouring  
nations.

James, Viscount Stair. Edinburgh, <sup>4<sup>th</sup></sup> ~~3<sup>rd</sup>~~ Edn. 1822

Stewart/

✓ Stewart

A treatise on the Law of Scotland relating to the Rights of Fishing.

Charles Stewart.

Edinburgh 1869.

Stowell

International Law. A restatement of Principles in conformity with actual practice.

Ellery C. Stowell.

London 1931.

Taylor

A Treatise on Public International Law.

Hannis Taylor.

Chicago. 1901.

Thorkelin, G.J.

Diplomatiarum Arna-Magnaenum exhibens monumenta Diplomatica. Leipzig. 1786.

Twiss (In part I)

Sir Travers Twiss.

The Black Book of the Admiralty.

Edited Twiss. Rolls Series. London 1871-6

Twiss (In part II)Peace

The Law of nations. On the rights and duties of nations in time of peace.

Sir Travers Twiss Oxford 1864.

War

The Law of Nations. On the rights and duties of nations in time of war.

Sir Travers Twiss. Oxford 1875.

Valin

Nouveau commentaire sur l'ordonnance de la marine.

René Josué Valin

La Rochelle. 1766.

✓ Vattel

Le Droit des gens ou principes de la loi naturelle appliqués à la conduite et aux affaires des nations et des souverains.

Emerich de Vattel.

Reproduction of the text of 1758 published by the Carnegie Institution of Washington. 1916.

Von Martens/



Von Martens

The Law of nations being the Science of National Law etc.

G.T. Von Martens  
(Trans. William Cobbett)  
London 1829.

Walker, T.A.

A History of the Law of nations.  
Cambridge. 1899.

Warrender papers.

Vol. II. Scottish History Society.  
Edinburgh 1932.

Welwod, William

De Dominio Maris Juribusque ad Dominium Praecipue  
Spectantibus Assertio Brevis et Methodica.  
London. 1615.

Abridgement - An Abridgement of all Sea Lawes.  
London. 1636 Edn.

Sea Law - The Sea Law of Scotland.

(Edited by T. Callendar Wade.  
Scottish Text Society. Edinburgh. 1932.

Westlake, John.

International Law. 1907 and  
Cambridge. 1910.

Wheaton

Wheaton's Elements of International Law.  
(6th English Edition (Revised by A Berridale Keith  
London 1929).

Wheaton- International Law

Text of 1866 Edition of above.  
Published by the Carnegie Endowment for International Peace. 1936.

Wheaton - History.

History of the Law of nations. Henry Wheaton.  
New York. 1845

Woolsey Theodore D.

Introduction to the study of international Law.  
New York. 1864.

Yair, James

An Account of the Scotch(Staple) Trade in the  
Netherlands. London. 1776.